JUDICIAL INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES AT THE SOCIAL SECURITY ADMINISTRATION

HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

JUNE 13, 1990

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JUDICIAL INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES AT THE SOCIAL SECURITY ADMINISTRATION

WEDNESDAY, JUNE 13, 1990

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10 a.m., in room B-318, Rayburn House Office Building, Hon. Andy Jacobs, Jr. (chairman of the subcommittee) presiding.

[The press release announcing the hearing follows:]

FOR IMMEDIATE RELEASE
THURSDAY, MAY 24, 1990

SUBCOMMITTEE ON SOCIAL SECURITY #16
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BLDG.
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-1721

ANDY JACOBS, JR. (D., IND.), CHAIRMAN,
SUBCOMMITTEE ON SOCIAL SECURITY,
COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES,
ANNOUNCES A HEARING ON THE JUDICIAL
INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES
AT THE SOCIAL SECURITY ADMINISTRATION
ON WEDNESDAY, JUNE 13, 1990, AT 10:00 A.M.,
IN ROOM B-318 RAYBURN HOUSE OFFICE BUILDING

Andy Jacobs, Jr. (D., Ind.), Chairman of the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, announced today that the Subcommittee will hold a hearing on Wednesday, June 13, 1990, in room B-318 Rayburn House Office Building, beginning at 10:00 a.m. The hearing will focus on means of assuring the judicial independence of the Administrative Law Judges (ALJs) who preside over hearings arising out of social security appeals.

BACKGROUND

When the Social Security Administration (SSA) denies an individual's claim for benefits, the claimant can challenge the agency decision before an ALJ. Organizationally, these ALJs are located within the SSA Office of Hearings and Appeals (OHA). In 1989, SSA ALJs presided over approximately 274,000 appeal hearings and overturned 60 percent of agency decisions in these cases.

To ensure ALJs' decisional independence, the Administrative Procedures Act (APA) exempts them from certain Federal personnel practices and civil service laws. While precluded from interfering with ALJs' decisions by the APA, OHA management retains authority to supervise the ALJ decision-making process to ensure its consistency with agency procedures, as well as to manage the offices in which ALJs serve.

FOCUS OF THE HEARING

In recent years, many ALJs have charged that OHA management policies are interfering with their decisional independence (see GAO report 90-15, "Many ALJs Oppose Productivity Initiatives," December 1989). Principally, these judges hold that OHA's monthly performance targets prevent them from devoting adequate time to appeals, precluding them at times from reviewing and/or developing relevant evidence. They also contend that OHA has used certain other management practices -- i.e., reassignment of ALJs' support staff to OHA office managers, denial of ALJs' employment transfer requests, and the selective transfer of cases from one OHA office to another -- to pressure ALJs to comply with unrealistic performance targets.

The hearing will assess the validity of these charges, as well as the need for additional measures to assure ALJs' judicial independence. Witnesses are invited to comment on the following issues:

* Performance Targets: How much latitude should SSA managers have to determine the pace and timing of ALJs' decision making? Are specific performance targets consistent with the guarantees of judicial independence for ALJs provided under the APA? If so, how should such targets be established, and what measures should be used to enforce them? If not, what other management tools, if any, should be used to assure timely hearings for claimants?

* Organizational Structure: Some observers contend that ALJs' decisional independence could be enhanced by elevating their position in SSA's organizational hierarchy or locating them within another part of HHS or SSA. Is it likely that the quality of ALJ decision making would be improved by such an organizational restructuring? If so, what is the optimal reorganization?

(MORE)

* Support Staff: Many ALJs have been critical of OHA's so-called reconfiguration of office support staff, whereby support staff formerly assigned to a single ALJ were reassigned to OHA office management. Has this change affected ALJs' performance? If so, how? What staffing configuration would be most likely to enhance the quality of ALJs' decisions?

DETAILS FOR THE SUBMISSION OF REQUESTS TO BE HEARD:

Requests to be heard at the hearing must be made by telephone to Harriett Lawler or Diane Kirkland [(202) 225-1721] by noon Wednesday, June 6, 1990. In order to facilitate scheduling, requests should indicate the specific issues that the witness wishes to address. The telephone request should be followed by a formal written request addressed to Robert J. Leonard, Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. The Subcommittee will notify by telephone those scheduled to appear as soon as possible after the filing deadline. Any questions regarding a scheduled appearance should be directed to the Subcommittee staff at [(202) 225-9263].

In view of the limited time available to hear witnesses, the Subcommittee may not be able to accommodate all requests to be heard. Those persons and organizations not scheduled for an oral appearance are encouraged to submit written statements for the record of the hearing. All persons requesting to be heard, whether they are scheduled for oral testimony or not, will be notified as soon as possible after the filing deadline.

Witnesses scheduled to present oral testimony are required to summarize briefly their written statements in no more than five minutes. THE FIVE-MINUTE RULE WILL BE STRICTLY ENFORCED. Subcommittee Chairman Jacobs advises witnesses that they will be allowed no more than two "finally's" and one "in conclusion." The Congressional Budget Office and similar U.S. Government agencies may be granted an exception. The full written statement of each witness will be included in the printed record.

In order to assure the most productive use of the limited amount of time available to question witnesses, those scheduled to appear before the Subcommittee are required to submit 100 copies of their prepared statements to the Subcommittee on Social Security office, room B-316 Rayburn House Office Building, at least 24 hours in advance of their scheduled appearances. Failure to do so may result in the witness being denied the opportunity to testify in person.

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Persons submitting written statements for the printed record of the hearing should submit six (6) copies by the close of business Wednesday, June 27, 1990, to Robert J. Leonard, Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing a written statement for the record of the printed hearing wish to have their statements distributed to the press and the interested public at the hearing, they may provide additional copies for this purpose to the Subcommittee, room B-316 Rayburn House Office Building, on the day of the hearing.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages.
2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.
3. Statements must contain the name and capacity in which the witness will appear or, for written comments, the name and capacity of the person submitting the statement, as well as any clients or persons, or any organization for whom the witness appears or for whom the statement is submitted.
4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and public during the course of a public hearing, may be submitted in other forms.

Chairman JACOBS. We convene the hearing on the question of judicial independence for administrative law judges under the Social Security system. Our first testimony will be from the General Accounting Office. Mr. McDonald, Associate Director for Income Security Issues, Human Resources Division, accompanied by Cameo Zola, Senior Evaluator, and Julian Klazkin. Please come forward and give us the benefit of your knowledge, wisdom, and guesses.

STATEMENT OF GREGORY J. McDONALD, ASSOCIATE DIRECTOR FOR INCOME SECURITY ISSUES, HUMAN RESOURCES DIVISION, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY CAMEO ZOLA, SENIOR EVALUATOR, HUMAN RESOURCES DIVISION; AND JULIAN KLAZKIN, ATTORNEY, OFFICE OF THE GENERAL COUNSEL

Mr. MCDONALD. Good morning Mr. Chairman and members of the subcommittee. We are pleased to be here today to discuss the activities of the Social Security Administration's, (SSA's) administrative law judges, (ALJs).

I am prepared to summarize my remarks. I ask that my full text be included in the record.

Chairman JACOBS. Without objection.

Mr. MCDONALD. Mr. Chairman, ALJs are unique Federal employees. They conduct hearings and make decisions on administrative proceedings of the agency that employs them. SSA employs more than 700 ALJs in 132 hearing offices around the country to hear challenges from individuals whose applications for Social Security or Medicare benefits have been denied.

The role of SSA's administrative law judges differs from that of other ALJs in the Federal Government. SSA hearings are nonadversarial and informal, and the judge has responsibility for both developing the evidence and deciding the case. In contrast, most other executive branch ALJs hold formal, adversarial hearings that are similar to a trial. Responsibility for developing the evidence in these other hearings is left to the parties in the proceedings, who are often represented by attorneys.

To ensure their decisional independence, the Administrative Procedure Act grants ALJs certain specific exemptions from normal management controls. Under the act, Federal agencies: cannot apply statutory performance appraisal requirements to ALJs; may not reassign or transfer ALJs without approval of the Office of Personnel Management; may remove ALJs only for "good cause," as determined and established by the Merit System Protection Board; and must assign ALJs cases on a rotating basis, to the extent practicable.

Management is permitted, however, to supervise and review ALJs work to ensure its efficiency, quality, and adherence to agency policies and procedures. At SSA, this supervision and administrative support is provided by the Office of Hearings and Appeals (OHA).

Over the years, conflict has arisen between OHA and SSA's judges over various management practices. At the subcommittee's request, we reported late last year on the causes for recent con-

flicts and whether reductions in staff, especially in judges, had adversely affected the adjudicative process.[1]

ALJ CONTROVERSY CENTERS ON MONTHLY DISPOSITION GOALS

Historically, SSA has used a monthly disposition goal to encourage ALJs to decide more cases and, in part, in an attempt to reduce processing delays. The goal has been based on management's judgment of what ALJs need to accomplish to keep up with their appeal workload and has changed as the workload and number of judges has changed.

Monthly disposition goals appeared to have increased the average monthly disposition of cases per ALJ. They have also been at the core of a long-standing controversy between SSA and its judges. Each time the goal was increased, the number of ALJ decisions rose, even if the goal was not met. But many ALJs have complained that OHA's emphasis on productivity has had a negative effect on their work—either damaging morale or leading to lower quality decisions.

These views, however, were not universally held by the judges. In preparing our report last year, we sent a questionnaire to all nonmanagerial ALJs. About half of those responding complained about the productivity measures, and 34 percent said that the quality of their decisions had deteriorated over the past 3 years. Yet 27 percent said that the quality of their decisions had improved. About 29 percent of the responding ALJs said that the quality of their service to the public had worsened, but about 23 percent of the ALJs said that it had improved.

In our opinion, the issue of performance goals need not be as divisive as it is. The desirability of good performance standards has long been established. As early as 1978, we identified the need for performance standards for all ALJs throughout the Federal Government. We recommended that Federal agencies employing ALJs establish performance standards delineating what is expected in terms of work quality and quantity. However, the key element in this recommendation is the link between work quality and quantity. We support SSA's need for performance goals and standards. However, while SSA has established performance goals, we believe that it has not adequately studied the relationship between the quality and quantity of decisions.

As a result, SSA lacks a system for adequately measuring the impact of productivity changes or initiatives on quality and thus lacks the ability to validate its performance goals. In our December 1989 report, we recommended that the SSA Commissioner direct OHA to determine the appropriate number of cases that ALJs should be expected to decide. In making this determination, we believe OHA should give proper balance to the quality of decisions. The results of such a study should be used as a basis for establishing and validating reasonable monthly disposition goals.

OHA told us about a year ago that it planned to develop and implement a data base of decisional deficiencies identified during its

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[1] Social Security: Many Administrative Law Judges Oppose Productivity Initiatives (GAO/HRD-90-15, Dec. 7, 1989).

Bellmon reviews—OHA's only routine review of the quality of ALJ decisions—and to use this information periodically to monitor the quality of ALJ decisions. Such a data base would give OHA a better capability to evaluate whether organizational changes or certain management initiatives affect the quality of ALJs' work. We understand this effort has been delayed because of budget constraints.

However, OHA has begun to develop a work measurement system. In January 1990, the former Associate Commissioner of OHA established a task force to submit recommendations on a work measurement system for OHA field offices that would reflect the level of service that the public should expect. The task force gave the Deputy Commissioner for Programs its initial draft of a work measurement system in May 1990, and the Department of Health and Human Services has informed us that the task force's work should be completed this month.

STAFF REDUCTIONS ADVERSELY AFFECTED OHA'S PERFORMANCES

Let me turn next to the issue of staffing. In 1985, SSA began a major initiative to decrease its work force. Under this initiative, every SSA component, including OHA, had to reevaluate its staffing needs. From fiscal year 1985 through fiscal year 1988, the numbers of ALJs and support staff were allowed to decline through attrition. By fiscal year 1988 the ALJ corps was at a 10-year low of 657 judges.

Early staff reductions appeared warranted, particularly considering the large decline in appeals that accompanied the moratorium placed on continuing disability reviews.[2] However, as the number of appeals began to climb back to its premoratorium level in 1986, OHA did not increase its staffs, especially its ALJ corps, to keep pace with the increasing workload. This caused a decline in some of OHA's performance indicators, but decreased resources appeared to have little effect on operations until fiscal year 1987. In that year the number of pending cases increased by more than 26 percent to over 148,000, and the average processing time for a case increased from 172 to 198 days. The indicators worsened further in 1988 and, although OHA increased its ALJ corps in fiscal year 1989 to about 700 judges, performance continued to decline. The average age of pending cases and average processing time reached their highest levels during the decade at 147 and 217 days, respectively, and the number of pending cases increased to 159,268. This situation has remained largely unchanged through the first 6 months of fiscal year 1990. By the end of this fiscal year OHA expects to have about 750 ALJs on duty, the highest level since 1984.

OHA increased its support staff in fiscal year 1988, but some hearing offices continued to have staff shortages. Ninety-four percent of the ALJs who reported that their offices lost support staff during fiscal year 1988 said that this had a negative effect on their offices' ability to process appeals. Over 50 percent of them said that the loss of staff led to longer processing times and poorer quality

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[2] Reacting to public and congressional pressure, the Secretary of Health and Human Services stopped reviewing all beneficiaries for their continuing eligibility under the disability program in early 1984 and did not resume such reviews until January 1986.

work. Managers in the offices that lost staff verified that the loss had a negative effect on their work.

As of May 1990, SSA had increased its ALJ corps to 715 and, by the end of this fiscal year, OHA expects to have about 750 ALJs on duty. OHA had about 3,672 support staff on duty as of May 1990, and expects to have about 3,985 by the end of the fiscal year. According to OHA staffing estimates, about 100 of the 132 ALJ field offices are short some support staff. Because hiring is decentralized to the regional offices, OHA could not estimate the number of offices that will continue to have staff shortages as the year progresses.

This concludes my statement. I will be pleased to answer any questions.

Chairman JACOBS. Thank you.

Mr. Cardin will inquire.

Mr. CARDIN. I would like to know if you have any information as to whether there is a feeling that these performance standards have been set based upon the workload currently in SSA for the administrative law judges, or whether these performance standards, from your review, are based upon time necessary for an administrative law judge to render a decision.

Have you looked at standards with regard to normal case load or were the performance standards subsequently established to meet the workload?

Mr. MCDONALD. Mr. Cardin, up to this point they have been established pretty much as you suggested, on a workload basis, the number of available judges and the available case load. I think if you look at the performance goals that have been set, you will find a direct relationship between the number of judges and the pending case load. One of the things that we recommended in our report to the Social Security Administration was that the qualitative aspect, such things as the time it takes to render a decision and the complexity of that decision should be a part of the study.

That study is what their task force is now doing. The results are still being anticipated at this point. We hope that out of that study will come a more reasoned, verifiable approach to performance standards so that the standards could, in fact, be validated.

Mr. CARDIN. ALJs who will be testifying here contend that performance standards affect the quality of their review. Do you have any independent information as to whether the quality of the review suffers as the number of cases handled by the administrative law judges increases?

Mr. MCDONALD. We don't have any independent information on that. We have not seen a compelling case made to us that there has been a deterioration in quality. Certainly there is testimony to that effect. But, as I alluded to in my statement, there are as many judges who believe it has gone the other way as those who believe it affected quality.

In the absence of an objective assessment, you have a lot of opinions in both directions.

Mr. CARDIN. There has been a continuing controversy among members of the public and bar as to the ability of ALJs to be independent and render independent judgments when they are under the arm of the SSA.

In your review did you come across any information one way or the other concerning the independence of the ALJs in rendering decisions? Has that been influenced at all by the standards or by the presence of the ALJs under the SSA?

Mr. McDONALD. We did not specifically look at the organizational structure. However, we did not come across any particular evidence that would indicate that there is a problem with that. Again you would need to see some sort of a compelling case that there had been some particular influence brought by the positioning of the Office of Hearings and Appeals and the ALJs within the organizational structure. We have not seen that. We did not specifically go looking for it either.

Mr. CARDIN. My last question you already may have addressed slightly. What do you believe should be done? What changes in procedures should be made? You indicated that the SSA should be looking at the complexity of the cases handled, but is there anything else specifically that you think they should be doing? Is there a different way in which ALJs themselves establish their performance standards? Do you have any specific recommendations on this?

Mr. McDONALD. Well, I am reluctant to go beyond the recommendation we made in the December report until we have seen the results from the SSA task force.

They are making that effort in response to our recommendation and also in response to a general concern that we have had across SSA for a number of years about the need to do organized work force planning on an informed basis.

I think the kinds of things that need to go into developing performance standards in any instance, whether for ALJs or other positions, have to include an evaluation of workload and then within the workload such issues as complexity and timeliness—desired timeliness for what you are going to set out as a public service goal—and some consideration for quality. So I think the next step is to allow SSA to complete the task force work and see what the results are.

Mr. CARDIN. So you did not look at any different type of structure where the ALJs themselves had greater control over establishing their own performance standards?

Mr. McDONALD. No, we did not specifically look at that.

Mr. CARDIN. Thank you, Mr. Chairman.

Chairman JACOBS. Mr. McDonald, that is sufficient for the moment. If you are not too busy, you might wait and hear other testimony. We might have questions.

Mr. McDONALD. We will be glad to.

Chairman JACOBS. Our next witness it the Commissioner of Social Security, Ms. Gwendolyn King. We are happy to welcome you here to the subcommittee again.

STATEMENT OF HON. GWENDOLYN S. KING, COMMISSIONER OF SOCIAL SECURITY, ACCOMPANIED BY LOUIS D. ENOFF, DEPUTY COMMISSIONER FOR PROGRAMS, SOCIAL SECURITY ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Ms. KING. Good morning, Mr. Chairman.

Chairman JACOBS. Do you have enough staff here?

Ms. KING. We thought we would pack the room in case there was a vote, Mr. Chairman.

I appreciate this opportunity to appear today. I would ask that the full text of my statement be placed in the record.

Chairman JACOBS. Without objection, it will be included in the record.

Ms. KING. To provide effective service to the American people, the Social Security Administration must possess many qualities—courtesy, professionalism, efficiency, compassion. As essential as any of these is the quality of fairness. Every SSA claimant must be unquestionably assured that their case will receive a fair hearing and that the agency's decisions will be made judiciously, fairly and based upon all of the available evidence.

For over 50 years, SSA's Office of Hearings and Appeals—OHA—has carried out this vital function. Through the administrative law judges, claimants have the important opportunity to personally present their case to a qualified, capable, independent adjudicator.

I am very pleased to be here today to discuss the service provided by OHA and the ALJs, the fairness and impartiality that mark our decisions, the steps we are taking to enhance this service, and also to offer comments on legislative proposals that would significantly alter this system and, I believe, its effectiveness.

We have a system that is working well. In fiscal year 1989, the number of Federal district court filings in SSA-related cases dropped below 8,000, the lowest level in nearly a decade and down from just under 12,000 the previous year. That speaks well as to the quality of our decisions at the appeals level. In addition, the rate at which the Federal courts upheld final Social Security decisions has risen to over 70 percent, a level achieved in the 1970s and early 1980s. In fiscal year 1984, by contrast, SSA's decisions were upheld just 43 percent of the time. We are working to see that the quality of our hearings and appeals work continues to improve to even greater degrees.

We have a system that promotes judicial independence. ALJs and Appeals Council members have a direct delegation of authority from the Secretary of Health and Human Services to decide cases. This authority sets the foundation for and guarantees the integrity of the adjudicatory process.

There is a strong and proper link between the Commissioner of Social Security and the hearings and appeals process. Hearings and appeals functions are consolidated within OHA. The Associate Commissioner for Hearings and Appeals heads that office and reports to the Deputy Commissioner for Programs who, in turn, reports to me. To alter that relationship, as one legislative proposal would do, by elevating the chief judge to report directly to the head of the agency is unnecessary and ill-advised.

My role as the head of this agency is to establish the policies which govern all levels of decisionmaking. I do not, nor should I, have a role in the individual decisions that are made at the hearings and appeals level. Neither I, nor any other administrator in this agency, can or should influence a particular decision. Adjudication should and must be done properly with strict adherence to statute and regulations. That is the way it has always been done and must be done to maintain the public's trust.

Decisionmaking authority has been delegated by the Secretary to individual, impartial judges. That is where that responsibility belongs, exclusively. To bring the Commissioner closer to those individual decisions simply would not promote public trust in the impartiality and independence of the ALJs.

Integrity is also not enhanced by taking the opposite approach, as has been frequently proposed, to divorce the ALJs from the Government's administrative agencies and to establish a totally separate, independent corps of judges ostensibly insulated from improper influence or pressure by policymakers.

ALJs must be independent in decisionmaking, Mr. Chairman, but they are not and should not be independent with regard to program policy. Congress delegates the responsibility for making and promulgating program policy to agency heads, not individual adjudicators.

Inevitably, if administrative law judges are split from their agencies, there will be conflicts over who sets, defines and is accountable for policy—is it the policymaker through rulemaking, or is it the adjudicator through individual case determinations? If judge and policymaker are within a single organization, these conflicts can surface and be efficiently and consistently resolved.

Mr. Chairman, I believe we should continually work to improve a system that has worked for years rather than move, unnecessarily, into uncharted territory. We are currently taking steps to make the system more efficient and responsive to public needs.

One issue that must be addressed is that of performance targets. I am concerned that we must not stress the quantity of cases that are handled by OHA to the detriment of the quality of those hearings and decisions.

The Office of Hearings and Appeals, with ALJ participation, has established a work measurement task force that will review how hearing office productivity goals are set and tracked. The task force will also consider broader and more comprehensive measures for hearing level performance. Productivity alone means very little to claimants who are less concerned with the number of cases an ALJ handles in a given month than they are with the processing of their individual case. I have directed OHA to consider performance measures that truly reflect the service we must provide to the public.

Another critical area is staffing. The General Accounting Office report observes that hearings and appeals workloads have increased at a faster pace than OHA has been able to hire staff. Let me bring the facts up to date.

For fiscal year 1988 as a whole, OHA hired 166 ALJs and related support staff, and has continued to hire ALJs and other staff ever

since. Currently, OHA is hiring 105 new ALJs who will be reporting for duty this July and August.

From November 1989 through January 1990, the threat of sequestration and a possible budget cut of more than $100 million forced a freeze on external hiring that resulted in a loss of ALJs and support staff. With the threat of sequestration eliminated and OMB's approval of my request to release $48 million of the $98 million contingency reserve, I have been able to provide the Office of Hearings and Appeals additional resources to meet critical needs.

Our hearings offices are also getting better productivity through good management. For example, a large number of our 132 hearings offices are pooling support personnel to better balance workloads within the office and relieve ALJs of direct supervisory responsibility. OHA gives individual hearings offices flexibility in addressing staffing, workload and space concerns, allowing local managers to use their judgment in providing quality, efficient service to the public.

And, looking ahead, the President's fiscal year 1991 budget proposal, if approved by Congress, will provide adequate resources for OHA to increase ALJ and support staff levels and will allow OHA to reduce the number of pending cases and improve the timeliness of our service to the public.

The effectiveness of SSA's hearings and appeals process will be a continuing object of my constant attention, Mr. Chairman. Each person who comes to SSA should expect a fair, impartial, judicious and timely consideration of their claim and they will get just that.

I want to assure the committee that I appreciate and share your interest and concern in ensuring the independence of the administrative law judges. I believe that, working together, we can bring optimum levels of fairness, productivity and efficiency into the system. I will be happy to answer any questions that you may have.

[The prepared statement follows:]

STATEMENT OF GWENDOLYN S. KING, COMMISSIONER OF SOCIAL SECURITY

I am very pleased to be here today to discuss the judicial independence of Administrative Law Judges (ALJs) in the Social Security Administration (SSA). I believe that we all agree that ALJs perform a critical function in agency decisionmaking. For many claimants, they represent an important opportunity to tell their story in a face-to-face setting with an impartial adjudicator. As requested, I will also address the organizational placement of the hearings function, performance targets for ALJs, and the use of support staff in hearings offices.

Judicial Independence

With regard to ALJ judicial independence, adjudicators at both the Hearings and Appeals Council levels have a direct delegation of authority from the Secretary to decide cases. This direct delegation of authority sets the foundation for and guarantees the integrity of the adjudicatory process.

Neither I nor any other administrator can nor do we want to intervene in a case or in any way direct an ALJ or a member of the Appeals Council on how to decide a case. Adjudication takes place on the record, and strictly according to the statute and regulations. That is how it is and must be to earn and maintain the public's trust.

Organizational Alignment

As you know, Mr. Chairman, both the Hearings and Appeals Council functions in SSA are consolidated in the Office of Hearings and Appeals (OHA). The Associate Commissioner for Hearings and Appeals heads that office and reports to the Deputy Commissioner for Programs, a career civil servant, who in turn reports to me.

Mr. Chairman, we have found that this alignment works well. The hearings and appeals function is clearly vital to SSA, and the head of that office has access to both the Deputy Commissioner and Commissioner to ensure that administrative needs and issues are promptly raised and addressed. That happens today.

The Associate Commissioner is responsible for overseeing both the hearings and appeals functions. The OHA executive responsible for the hearings function is the Chief ALJ that reports directly to the Associate Commissioner. In addition, the Associate Commissioner is also the Chair of the Appeals Council, which ensures that the executive responsible for overseeing both the hearings and appeals processes has the requisite authority to convene the council on call and address broad policy issues which affect both levels of adjudication.

Day-to-day administration of the appeals function in OHA is vested in the Executive Director of the Office of Appellate Operations, who also serves as the Deputy Chair of the Appeals Council. I have attached an organizational chart of OHA to my testimony.

Legislative Proposals

Preserving decisional independence both in fact and appearance is essential to maintaining the integrity of the adjudicatory process. A number of legislative proposals profess to "enhance" the decisional independence of the ALJs by elevating the Chief Judge to report directly to the head of the Agency. However, I do not find the rationale for these proposals to be convincing; in fact, the proposals are counterproductive.

The proponents of a direct reporting line argue that, to preserve or enhance the independence of ALJs in their decisionmaking role and prevent any improper pressure to decide cases one way or another, the Chief Judge should report directly to the Commissioner. I believe that such a direct reporting line to the politically appointed head of the Agency does exactly the opposite of what the proponents intend.

Mr. Chairman, as the head of this Agency, I am responsible for establishing the program policies which govern all levels of decisionmaking.

I do not have the authority to influence or intervene in individual decisions today, nor do I want it. That authority is directly delegated by the Secretary to individual, impartial decisionmakers where it belongs.

Independent ALJ Corps

Let me add one more thought on this subject, Mr. Chairman. some of these proposals would transfer the hearings function entirely out of SSA. This approach is similar to proposals made over the years to establish an "Independent Corps of ALJs" totally separate from the programs of the administrative agencies.

Although proponents of an "Independent Corps" suggest that administrative efficiencies may be possible if ALJs were consolidated in a single agency, the primary purpose of such a "Corps" is to provide ALJs additional insulation from improper influence or pressure by policymakers beyond that now afforded ALJs under the APA. I have served since last August as Commissioner and I have not seen any evidence of any interference or influence on the decisional independence of ALJs.

ALJs must be independent in decisionmaking, Mr. Chairman, but they are not and cannot be independent with regard to program policy. Congress delegates the responsibility for making and promulgating program policy to agency heads, not individual adjudicators. The inevitable results of an organizational split between policymaking and adjudication are conflicts over who sets and defines policy. In other words, does the policymaker determine policy through rulemaking or does the adjudicator determine policy through interpreting individual cases. When both functions are within a single organization, these conflicts can surface and be resolved; indeed, feedback from adjudicators on how policy actually works in the real world of case adjudication is an essential ingredient in the policymaking process.

Performance Targets

I would like to turn, Mr. Chairman, to the General Accounting Office's (GAO) December 1989 report entitled, "Many Administrative Law Judges Oppose Productivity Initiatives." I want to take this opportunity to commend the GAO staff who worked on this report. As you can see from the Department's rather extensive comments, we disagreed with a number of the report's findings and conclusions, especially as the report was first drafted. Nonetheless, GAO staff were very open to considering our comments and, while we continue to disagree on certain points, we believe that the final report presents a more balanced picture of SSA's goals and objectives for the hearings process.

Much of this GAO report was devoted to the role of performance targets. On this question, GAO recommended and I agreed that there is a need for further study "to determine the appropriate number of cases that ALJs should be expected to decide," considering at the same time the need to give "proper balance to the quality of decisions."

Agreeing on this proposition, however, does not address the question of how such a study might be designed and conducted. The first question is how the "quality" of any given decision should be assessed--and by whom. Clearly, the Appeals Council and the courts make these judgments every day as ALJ decisions are reviewed. Many ALJs, however, question whether those assessments are "accurate" measures of decisional quality.

In addition to the quality question, only some aspects of case processing at the hearings level can be measured objectively and most of those relate to case processing actions by the Hearings Office Support Staffs, not the ALJs themselves. It will be very difficult to measure the time necessary for an ALJ to review the case, make judgments regarding the need for evidentiary development, and decide the case once the record is complete.

Work Measurement Task Force

OHA has established a work measurement task force, with ALJ participation, to review the question of how hearings office productivity goals are set and tracked. As noted in the Department's comments on the GAO report, we are concerned about the possibility that undue concentration on quantity might have an adverse affect on quality. Therefore, we have not set hearings goals above the levels that hearings offices have demonstrated in the past are achievable.

Moreover, the task force is charged with considering broader and more comprehensive measures for hearings level performance. Goals which are defined primarily in terms of dispositions per ALJ do not reflect the fact that a case disposition is the product of the entire hearings office staffs' efforts. The ALJ's decision is, of course, central, but it is not made in isolation. In addition, productivity alone means very little to a claimant who is concerned with the processing of his or her case, but not with how many total cases an ALJ or a hearings office may dispose of in any given month. Thus, OHA is considering performance measures which will reflect all the staffs resources used in case processing and the outcome of the effort in terms of service to the public.

Quality Initiatives

Let me turn now to some of our other concerns with the GAO report. The final report acknowledges that OHA is not solely preoccupied with productivity, but it does not discuss at any length OHA's quality initiatives. In fact, the first goal in OHA's operational planning system is to improve the legal sufficiency and defensibility of the final decision. To achieve that, OHA has:

- established and delivered a new continuing legal education program for ALJs;
- developed and delivered a new decisionwriter training program for staff attorneys and analysts at both the hearings and appeals levels;
- implemented a new format for decisions which focuses on stating the legal reasoning for that determination;
- begun a complete overhaul of OHA's policy and procedural manual and procured software to make the new manual available on personal computers; and
- developed and automated a circuit court reporter system as a legal reference tool.

These and other initiatives have had a very positive impact on legal sufficiency and defensibility of final decisions, as reflected in two important indicators. The number of Federal district court filings in fiscal year (FY) 1989 dropped below 8,000, the lowest level in nearly a decade. In addition, the rate at which the Federal Courts uphold final Social Security decisions has risen to over 70 percent, the level achieved in the 1970's and early 1980's. In short, Mr. Chairman, quality does matter--in OHA and throughout SSA.

Staffing Issues

I would also like to comment briefly on another concern with GAO's report. The report notes that hearings and appeals workloads declined substantially between FY 1984 and FY 1986; as a result, OHA had excess production capacity during those years and did only limited outside hiring. When that trend began to reverse itself in FY 1987, OHA did not immediately begin to hire additional staff. Rather, OHA waited a few months to see whether the trend would be permanent and whether available capacity would be sufficient to handle the increased workloads.

The report observes that hearings and appeals workloads did indeed increase at a faster pace than OHA was able to hire staff. This was particularly true with respect to hiring ALJs, a rather lengthy process. ALJ hiring was begun in FY 1987, but the first recruits did not report until early FY 1988. For FY 1988 as a whole, OHA hired 116 ALJs and related support staff, and has continued to hire ALJs and other staff ever since.

OHA had planned to begin hiring 115 more ALJs at the beginning of this fiscal year. On November 1, 1989, facing sequestration and a budget cut of more than $100 million, we took steps to significantly reduce FY 1990 spending. These steps included a freeze on external hiring which resulted in a loss of ALJs and support staff during November through January. With the threat of sequestration eliminated, and the release of $48 million of the $98 million contingency reserve, I have been able to provide the Office of Hearings and Appeals additional resources to meet critical needs. OHA is hiring 105 new ALJs who would be reporting for duty in July and August 1990.

The FY 1991 President's budget request provides additional resources for OHA to increase ALJ and support staff levels, which would allow OHA to reduce the number of pending cases and improve the timeliness of our service to the public.

Hearings Office Organizational Structure

Finally, let me discuss the question of hearings office organizational structure, or more specifically, the assignment of staff within hearings offices. OHA does not prescribe any particular organizational structure for hearings offices. The only limits on how a hearings office is structured are those that apply government-wide, such as those that concern personnel classification. Each hearings office is supervised by a Chief ALJ who makes decisions on organizational structure and supervisory responsibilities for support staff.

I understand that some years ago, most hearings offices were structured along what is known as the "unit" system whereby each ALJ was assigned (and supervised directly) certain members of the support staffs. Thus, an ALJ's unit might be comprised of a hearings assistant, a decisionwriter, and one or more hearings clerks. In the early 1980's, OHA experimented with what is sometimes called "reconfiguration." In a reconfigured hearings office, support staffs for each function in the office--pre-hearings case preparation by hearings assistants, decision drafting, and decision typing--are consolidated. Supervisory

responsibility would then be vested in a supervisor for that particular function--for example, a supervisory hearings assistant, hearings clerk, or staff attorney.

The rationale for this approach to hearings office organization was, among other things, that it facilitated balancing workloads within the office and relieved ALJs of direct supervisory responsibility (although their advice on support staff performance was and is solicited). After testing this structure, OHA considered mandating it nationwide, but decided not to do so when it became clear that what works in one location may not work in another. OHA found that flexibility is essential for addressing staffing, workload, and space variations among the 132 hearings offices. In a small office, for example, there may not be enough support staff to justify creating separate supervisory positions.

More importantly, however, OHA realized that the key question is not how an office is configured, but how it performs. As long as an office provides good and efficient service to the public and adheres to the rules and regulations regarding program policies and personnel matters, its internal structure is best left to the hearings office Chief ALJ. In short, let local managers manage.

Conclusion

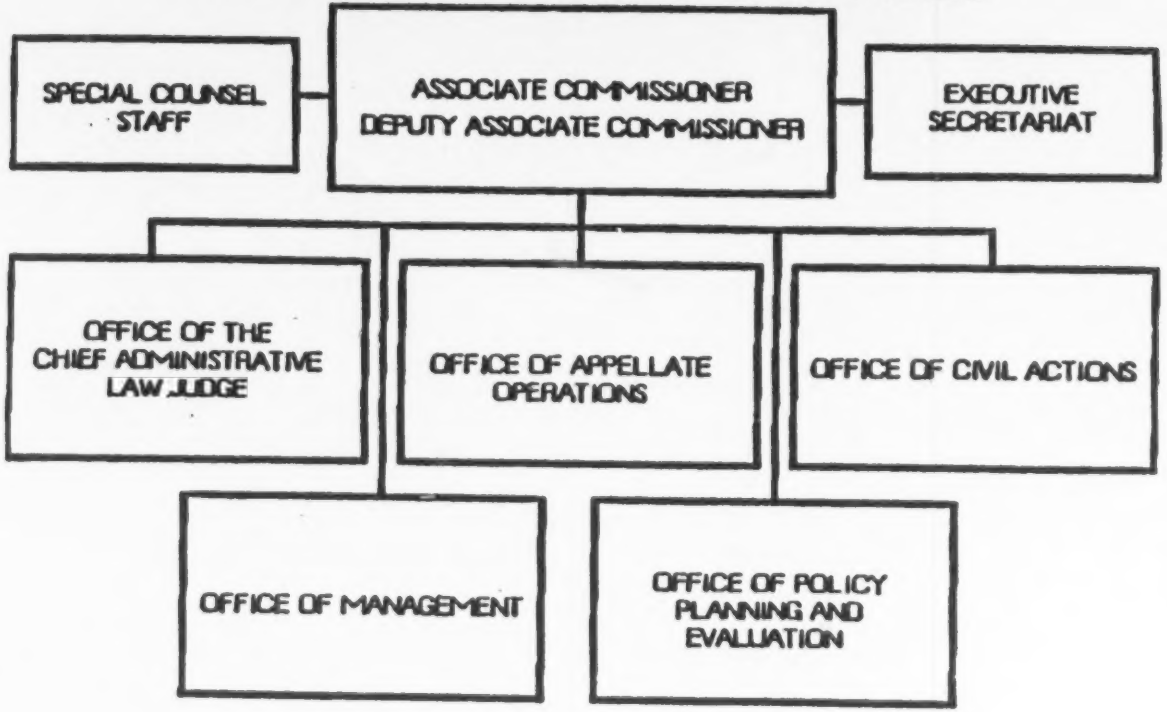
In conclusion, it is obvious that the nature and variety of issues that I have discussed today--issues involving the judicial independence of ALJs, proposals to change the organizational placement of ALJs, ALJ performance, decisional quality and work measurement efforts, and hearings office configurations--must be effectively addressed to enable SSA to continue its long tradition of quality service to the public. The significance of these issues is highlighted by the substantial efforts undertaken by GAO in its study involving ALJ productivity issues--these efforts will enhance all of our joint efforts to address the issues discussed today.

Mr. Chairman, I believe that it is equally obvious that the sensitivity and complexity of these issues underscores the need for careful and deliberate consideration of any changes related to the vital functions that ALJs perform. Let me clearly state my determination to ensure that SSA will continue to assess changing circumstances and will act effectively to make any necessary changes in a process that must continue to meet the demands of high hearings and appeals workloads.

At the same time, please let me assure the committee that I share its interest and concern in ensuring ALJs' independence and that I believe, working together, we can continue to make these goals realities.

This concludes my testimony. I will be happy to answer any questions that you may have.

OFFICE OF HEARINGS AND APPEALS



Chairman JACOBS. Thank you.

Mr. Cardin.

Mr. CARDIN. Ms. King, are the current performance standards totally based upon the number of cases handled by the ALJs?

Ms. KING. For the most part what is in place is put there because in some way we have to our resources. It is overlaid by the fact that the current goal is a goal that has been attained for the past 2 years. That goal has not changed. It is something that I believe we need to continually look at.

Part of the reason that I am pleased about the fact that the task force will be looking at this is that the task force is made up of ALJs as well as others. I believe there is a need to have a direct participation in any setting of production goals the agency follows.

Mr. CARDIN. You anticipated my followup question. Both you and I agree that the performance of an ALJ should not be judged solely on the number of cases handled. The quality of work and the complexity of the cases handled by a particular ALJ should also be taken into consideration.

It seems to me that the best way to establish performance standards is to have the ALJs directly involved. In your testimony and response, you indicate that you have a task force that includes ALJs. I would like you to consider one additional point. That is, it is fine to have ALJs on the task force, but it seems to me there could be more direct involvement by the administrative law judge corps in developing the performance standards, in monitoring the performance standards, and in working with you.

I find that in many cases, my peers are the best judge of how well we are doing our work. If there is some way the judges could be more directly involved, I think you might have more support. Obviously, there are two issues here. One is the way to evaluate the work of ALJs, and the second is independence. From your testimony and from the GAO response to my question, it appears there is not a perceived problem on the independence.

Before coming to the Ways and Means Committee, I was on the Judiciary Committee, on Mr. Frank's subcommittee. We had a long hearing on the independence of the ALJ corps. I really want to make that point. It seems to me that it is incumbent to bring the ALJs into the process. You are doing that through the task force, and I urge you to consider going further than that.

Ms. KING. Thank you, Mr. Cardin. May I respond so the record is clear?

The performance goals that we have are really performance goals based on a national average for the hearing offices. We do not evaluate or measure individual administrative law judges. I want to make this clear so that you understand that we try to be sure that, based on the work we have, we are constantly trying to ensure that we have sufficient administrative law judges and other staff on board to handle the workload.

We use a production goal of 37 cases for each ALJ in an office in estimating our ALJ staffing needs. We certainly are prohibited from evaluating individual performance and holding each ALJ to 37 cases.

Mr. CARDIN. The perception among the ALJs is different than that. One will testify later that he believes a transfer was denied

because he did not meet certain standards. There is a feeling out there that there is an evaluation process going on in OHA that can affect the ALJs' future in SSA.

Ms. KING. I am glad you mentioned that. I think it is important to understand that because we have 132 hearings offices and caseloads can differ in different parts of the country. When people request transfers, it is important to look at what the workload is currently in the office and whether we have sufficient ALJs to backfill there and, frankly, whether we are going to be able to provide the needed support to an office.

Some 132 offices gives us a lot of latitude to try to accommodate people if for some reason they have a personal problem, an ill relative or an illness of their own. We try to accommodate personal considerations. By way of example, we have already heard this morning that many of our offices are not fully staffed. We are continually bringing people on board. We do have some offices that have more staff than we can justify and we are trying to shift some of those around. Certainly, we would not encourage taking administrative law judges from areas that are severely overloaded and putting them in places that are not.

I don't know the particular circumstance that will be addressed in this morning's testimony, but I want you to understand that there are a number of factors that must be considered in considering the transfer.

Mr. CARDIN. Are you saying the number of cases an ALJ handled would not be a factor or that it would be taken into account in a transfer?

Ms. KING. I certainly would not sanction that being the measure of whether a judge should be transferred or not.

Mr. CARDIN. What are the performance standards for? If you don't use them for evaluation, then what for?

Ms. KING. We establish overall organization goals for a variety of purposes. For example, in formulating our budget we have to estimate the number of judges and support staff we will need in upcoming years.

We have the number of cases that we know are pending. We can estimate what will come in and the number of cases we can reasonably expect will be disposed of in any period of time.

We have to make the cut somewhere. The reason we used the 37 cases for the production goals for the last several years is that it appears to be a level most of the offices on average are able to achieve.

Mr. CARDIN. Aren't you also using it to get the judges to render that number of decisions every month?

Ms. KING. Again, Mr. Cardin, we say 37 cases per judge. If there are judges who turn out 50 cases and some have more complicated matters and turn out fewer, we are really just looking at the averages.

When we give you the number of offices that have managed to meet that goal, I cannot tell you that every ALJ in each of those offices has met that goal.

Mr. CARDIN. My staff just handed me a letter that was given to one ALJ that clearly indicated that his transfer was denied because of his inability to reach the productivity standards.

Ms. KING. Is that a letter I signed.

Mr. CARDIN. Mr. Rucker signed it.

Ms. KING. What was the date?

Mr. CARDIN. July 29, 1988.

Ms. KING. Mr. Rucker at that time was the Chief Administrative Law Judge at the Office of Hearings and Appeals.

Mr. CARDIN. That is correct.

Ms. KING. I am not familiar with that letter.

Mr. CARDIN. It predates your tenure.

Ms. KING. I would be glad to take a look at it. I am sorry, I am just not familiar with the substance of it.

Mr. CARDIN. Thank you.

[The letter follows:]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

JUL 2 0 1988

Russell S. Barone
Administrative Law Judge
The Kluczynski Federal Building
230 South Dearborn Street
Room 2646
Chicago, Illinois 60604

Dear Judge Barone:

We recently completed our review of Administrative Law Judge (ALJ) applications for positions in hearing offices (HOs) designated as having a priority need for additional ALJs. Although we received requests from 46 judges for 39 different locations, we were able to recommend only 16 reassignments to Commissioner Hardy for approval.

In reviewing ALJ applications for reassignment, we consider not only the ALJ's personal situation, but also the effect the judge's transfer would have on both his or her home office and the office to which he/she would be reassigned. With respect to the Chicago South Hearing Office, the workload situation is such that it would be difficult, if you were to transfer, for the remaining ALJs to handle the workload there. As you know, we are trying to place additional ALJs in the Chicago area hearing offices; however, in response to our recent announcements regarding ALJ transfer opportunities, we had no suitable transfer candidates apply for the Chicago area offices. It also appears that we will not be able to hire an adequate number of new ALJs to meet the workload needs there.

As to the effect your transfer might have on the Buffalo office, we were concerned that, based on your past record of productivity, your reassignment would not enable us to meet the need we have identified there. Because our aim in transferring ALJs is to ensure that the need in the priority office is met, as a rule we reassign only those judges whose productivity level is at or above average.

For this reason, although I appreciate the personal situation which prompted your transfer application, I am unable to accommodate your request at this time. However, we do expect to offer additional reassignment opportunities early next year. If you are still interested in changing locations at that time, your request will be given full consideration according to the criteria noted above.

Sincerely yours,

James R. Rucker, Jr.
Chief Administrative Law Judge

Chairman JACOBS. Mr. Levin.

Mr. LEVIN. Good morning.

Ms. KING. Good morning.

Mr. LEVIN. This is not the first time we have considered this matter. We have done so in a different forum. Like other members of the subcommittee, I have tried to review the materials and tried to assimilate them.

Let me request you tell us what you think the problem is. Why is there this discontent?

Ms. KING. At the risk, Mr. Levin, of looking back and second guessing about what might have happened in the past, let me say that I believe when you have this kind of difference in an agency, very often it stems from lack of or poor communication. We have, in the last 10 months, tried very hard to communicate on a regular basis with the employees at Social Security. I have visited all 10 regions. I have visited nine of our regional offices. Wherever I go, I make it a point to visit with the administrative law judges.

Frankly, I have seen some of the conditions under which they work, and I realize that we have a lot to do. But I do believe that in most of these instances if you simply open lines of communication, you get beyond a lot of differences.

We have just appointed in recent months a new chief administrative law judge. We are very fortunate in having our previous administrative law judge serve as the regional chief judge for Denver, Kansas City, and Seattle. We do have some stability. The new chief administrative law judge has established an Administrative Law Judge Advisory Council to try to open lines of communication. I am eagerly awaiting the work of the task force which I think will give us some constructive information about how we can begin to put quality and quantity together as we look at our expectations for the offices.

But I also think, and it is certainly no surprise to you, Mr. Levin, that it is awfully hard to ask people to continue to keep up a steady beat of work when workloads are increasing and their numbers are decreasing. We experienced that in other parts of Social Security. We are determined to fix it. We are determined not to fix it unilaterally or only top down.

But we want to be sure we are addressing the problem with input from those we are asking to do this work. I think communication is key. I think proper staffing is key. I think creating an environment where the administrative law judges can conduct their work with a sense of dignity and urgency and judicial fairness is critical.

Mr. LEVIN. As I understand it, this tension and dissension are not characteristic throughout the agencies of the U.S. Government. The relationship between ALJs and the agency in which they serve, those relationships are much more hospitable in most other agencies.

Ms. KING. And in considerably smaller agencies I might add. We are the 800-pound gorilla with 70 percent of all ALJs in Government, maybe higher. When you have that critical a portion of your work force working in a separate stream, it is easy not to offer those lines of communication. I cannot speak for why the relationships are better in the other agencies. I know that our proceedings

are nonadversarial. I hope our relationship with the administrative law judges would also be nonadversarial. We are certainly going to work to get over that problem.

Mr. LEVIN. You seem to be saying there are some things wrong.

Ms. KING. What I am trying to say is, if there are things that are wrong, I don't believe we can pretend they don't exist. I think we need to fix them. Fixing them sometimes takes time but it takes both sides willing to come together. Whatever the problems of the past were, I can only assure you that I am looking to the future and hoping that when we are able to come up with a new set of goals that the ALJs themselves participate in their creation. We need to be able to come up with, frankly, decent chairs and hearing rooms and facilities for all our employees, but certainly for administrative law judges who are meeting the public under very difficult circumstances. I just believe we have a lot of work to do. I think we are just going to look ahead and go to it.

Mr. LEVIN. What in terms of working conditions, workload, which means increased staff, is a reasonable period of time? If you were an administrative law judge I think I read your lines and a bit between them. Let's say you were an ALJ and you heard the administrator express your point of view, and let's assume there is good will on both sides, what would be a reasonable period of time to pass when an ALJ could see these changes undertaken? I don't mean the exact date.

Ms. KING. I understand the question.

Mr. LEVIN. What you are saying is, you don't want to sit here and parcel out all the blame and put percentages on what is causing which. But there is something wrong on both sides, I think you add. You intend to fix what you think is your side of it from working conditions, from physical limitations, and from workload, which means more staff, which means your budget. Look at it from the point of view of the employee. What is a reasonable period of time to see change?

Ms. KING. I have tried to look at it from their point of view, Mr. Levin. Frankly, I think it is fair for them to expect that if the current situation has come to this after 50 years of operation then this Commissioner ought to at least have time to begin to address some of these problems.

The budget cycle for fiscal year 1991, my budget as we submitted it last year, will be decided on later this year. We will see just what resources we have to allocate. We are expecting to have a number of opportunities through the task force work and through the advisory council work to make some changes.

By July and August of this year, we are anticipating bringing on an additional 105 ALJs. We have staff levels set for support staff at about 4,400. I think we will hit 3,900 by the end of the year because it is difficult to find people and train them and get them on board.

But I think these kinds of things take patience. We are already seeing some changes in our staffing. The Associate Commissioner for the Office of Hearings and Appeals has been elevated to a wonderful position in region 3, Philadelphia, as the regional counsel. My colleague, the general counsel stole her away from us. But I see that as an opportunity to bring in new people who are committed to ensuring that we heal the wounds, and I expect to do that. I

would simply urge patience and open communication to my colleagues in the ALJs corps.

Help is coming their way. I would urge all of them to refrain from sending in their letters of resignation. We need them. We need their experience and expertise, and we need their continued participation in this critical effort. Quite frankly, I don't want to miss the point. This is really not about levels of comfort for administrative law judges. It is about putting in place a system that can quickly and fairly adjudicate the claims of people who are very vulnerable and who need our help. So I am expecting that as time goes on they will begin to see the progress too.

Mr. LEVIN. Thank you.

Chairman JACOBS. Ms. King, when you were asked whether performance standards, that is the number of cases disposed of, had anything to do with denying a transfer to an ALJ, I believe your response was that that was not the standard. I want to know whether you would also say that was not a part of the standard?

Ms. KING. I will provide whatever is written into our own guidelines for you for the record, Mr. Chairman. Since we do not set, and since we are prohibited from elevating or measuring the performance of our administrative law judges, I don't see how that would enter into it. The measurements would not enter into the picture.

[The following was subsequently received:]

THE COMMISSIONER OF SOCIAL SECURITY
BALTIMORE, MARYLAND 21235

JUL 31 1990

Honorable Andy Jacobs
Chairman, Social Security Subcommittee
House Ways and Means Committee
House of Representatives
Washington, D.C. 20510

Dear Mr. Chairman:

At the June 13 hearing before the Social Security Subcommittee, you asked about our policy with regard to requests for transfers from Administrative Law Judges (ALJ). You were specifically concerned with whether or not an ALJ must have demonstrated some minimum level of productivity to be considered for a transfer.

As I stated at the hearing, we do not require ALJs to demonstrate any minimum level of productivity in order to be considered for a transfer to a new duty station. I am enclosing a summary of the various factors we consider in making these decisions. As you can see, an ALJ's productivity is only considered in order to assess the effect of a possible transfer on the "losing" and "gaining" hearing offices.

I have now had an opportunity to review the July 29, 1988 letter from former Chief ALJ James Rucker to ALJ Russell Barone. It is easy to see how the last sentence on the first page could be read to require "average" or better productivity. However, I understand that when this letter came to the attention of the Associate Commissioner for Hearings and Appeals in 1988, she discussed the criteria with the Chief Judge and confirmed that there were no minimum productivity requirements as a precondition to transfer.

Finally, it is important to note that no employee, including an ALJ, has a "right" to change duty stations. Management must make these decisions fairly and objectively, of course, and we believe that the criteria spelled out in the enclosure allow us to do that.

I hope that this clarifies how we consider ALJ transfer requests. I am sending a similar letter to Mr. Cardin who also asked about our transfer policy. Please let me know if you would like further information.

Sincerely,

Gwendolyn S. King
Commissioner
of Social Security

ALJ TRANSFER POLICY

To balance staffing with workloads, the Office of Hearings and Appeals (OHA) periodically reviews workload and staffing data for all its Hearing Offices (HO) in order to identify which offices may need additional ALJs or may have more ALJs than current and projected workloads indicate are necessary. After such an assessment, OHA provides all ALJs a list of those offices in need of additional ALJs and solicits transfer requests from ALJs interested in relocating. In addition, ALJs may at any time submit a request to transfer from one location to another.

In determining whether to grant an ALJ's request to transfer from one duty station to another, the Office of Hearings and Appeals applies the following principles:

1. Requests based on personal hardship are given first consideration and approved whenever possible. Among other things, hardship may involve health considerations (either the ALJ's health or that of family members) or family separation (need to care for infirm or elderly parents or other family members).

2. Transfers request to a location where OHA has indicated a need for additional ALJs and which involve "no cost to the government" are considered next. If all candidates for a location will require the government to pay relocation costs, OHA must then consider the relative costs involved in transferring the candidates --i.e., distance, whether sale of a home is necessary, etc.

3. To determine which of several candidates for a location will be transferred, OHA considers the workload needs of the candidate's home office and those of the transfer office--i.e., what effect removing each candidate's productivity has on the ALJ's home office and on the gaining office. Candidates from offices which can afford to lose an ALJ are generally selected over those whose offices would become "needy" if a transfer were approved. Finally, the candidate's ability to meet the transfer office's needs for increased production may also be considered if the previous factors are not dispositive.

Chairman JACOBS. Quite apart from the official policy, do you know of any case where a decision has been made on that basis, whether it was extraregulatory or not?

Ms. KING. I do not. Again, what has happened in the past is probably a matter of record. I am not aware of any particular case but if anyone is, I would certainly like to know about it.

Chairman JACOBS. Let's take the situation where an administrative law judge gets one case done in 5 years and is in an office where there is an adequate number of ALJs and consequently has not crippled the efforts of the office or stymied its overall average too badly. Nevertheless, if you were short handed in another office and that particular ALJ wanted to be transferred to that other office, there might be some expectation that that particular ALJ might not help that office very much.

We are looking at one side of the coin. What I am getting at is hypothetical, maybe even hyperbole: that is, at some point surely quantity does count. There is not disagreement on this panel that we are not prepared to support a policy which would sacrifice reasonable quality for quantity.

We regard that not only as penny wise and pound foolish but penny wise and humanistically unacceptable. But surely there must be some way to gauge if an ALJ is plain lazy. In my State, we have a law known as the lazy judge law. That is, in the case of criminal matters not disposed of in 1 year as a consequence of the judge's action, the case is dismissed. The people lose the case against the defendant. How say you on extreme cases like that? When does it become removal or discipline for cause and who does the removing and who determines the cause?

Ms. KING. In the particular case you mentioned, I would suggest a transfer might not be feasible because we would have to continually place a mirror beneath the nose of the judge—if he is only doing one case in 5 years—to check that he is still with us. I realize that is an extreme case you brought to the table.

But I agree with you, if you are transferring people to help out with an active workload in another office, we would have to trust that the manager of that particular hearing office would recommend someone for transfer who would be able to contribute to getting that workload down. I would certainly rely on the management to give us those kinds of recommendations.

We do not have a lazy judge law at Social Security. Judges are removed only by the Merit System Protection Board. MSPB makes those determinations upon recommendation. We do have, I think, a very vigilant administrative law judge structure. We have hearings with office chief judges and regional chief judges, as well as our chief administrative law judge here at the Office of Hearings and Appeals, all of whom are encouraging and motivating and working with the judges at all times—looking in to see if they are having problems, and in fact, when necessary taking away some of the loads that can be done more quickly to free up time so that the administrative law judges can devote more time to other cases.

Chairman JACOBS. I will say for the record that in Senator Carl Hayden's last campaign for reelection, his opponent charged that he was dead. They had to go in and run television advertisements

showing the Senator raising his hand from the sheet. So nothing is impossible.

Thank you, very much.

Ms. KING. Thank you, Mr. Chairman.

Chairman JACOBS. We will have to go over and cast a vote. We will come right back then.

[Recess.]

Chairman JACOBS. The first panel consists of the Honorable Charles N. Bono, vice chairman, National Conference of Administrative Law Judges, American Bar Association; the Honorable Ronald G. Bernoski, secretary, Association of Administrative Law Judges, Inc.; Jonathan M. Stein, general counsel, Community Legal Services, Inc., Philadelphia, Pa.; and William A. Dombi, director, Center for Health Care Law.

Gentlemen, welcome to the subcommittee. You may proceed.

STATEMENT OF HON. CHARLES N. BONO, VICE CHAIRMAN, NATIONAL CONFERENCE OF ADMINISTRATIVE LAW JUDGES, AMERICAN BAR ASSOCIATION

Mr. BONO. Mr. Chairman, I want to thank you for the opportunity to be here today. I am appearing on behalf of the American Bar Association as vice chairman of the National Conference of Administrative Law Judges.

We have previously submitted a statement and I would ask it be made a part of the official record.

Chairman JACOBS. Without objection.

Mr. BONO. Previously we submitted a letter commenting on the GAO report which was dated March 1, 1990, with an attachment, tab A. I would also like that to be made a part of the record.

Chairman JACOBS. Without objection.

Mr. BONO. I will summarize a few important points. I realize our time is limited and certainly the issue is very complicated. I believe the GAO report should not be an issue here because it confirms a very, very significant systemic problem exists in the Office of Hearings and Appeals.

The symptomology with which the report deals has to be evidence of a very significant disease in the system. It is indicated by a lot of different things but one is performance targets. Here today we heard them referred to as performance targets and/or numbers, also performance standards. I think that is an example of the difficulty here because performance targets do equate to performance standards. In view of the fact that the agency is prohibited by law from evaluating——

Chairman JACOBS. If I might interrupt, if you are referring to my exchange with Ms. King, my recollection is that she said the failure to reach the goals was not the standard by which they are judged.

Mr. BONO. I did not imply that they were being used as performance standards, but I think there is a misconception by the use of the performance targets being translated into performance standards. We have had it referred to even by GAO, that they would like to have performance standards. The ABA believes performance standards, targets and quotas in numbers are inappropriate to the

hearings and appeals process. They are inconsistent with the due process that the judges have to see is carried out.

I think that is illustrated by many of the documents that I have filed with you today, because the tendency is, if you have a numerical performance goal or standard to meet, to rush to judgment and to not get the cases prepared correctly. If a judge does not rush, he feels the agency's pressure to do so on the basis that he is not really performing up to snuff.

I think therefore it belabors the point to talk about performance targets in numbers. I think they should be prohibited and abolished. The other issue is reconfiguration. It has been argued by the agency that it is an effective way to utilize support staff. We do not happen to agree with that. I don't think there is any substantial evidence that reconfiguration is efficient.

In fact, its one basic flaw is that it removes the expertise of the judge from the processing of the case that he or she is assigned to. That practice should also be abandoned. The unit system should be restored, and in that way the judge would have support staff assigned directly to him or her, and would be able to direct the processing of the case as it should be done.

The question in the press release was if they abandoned these management tools, what other appropriate management tools are there to see that hearings are timely held? I understand that that is a concern. There are other appropriate management tools. Unfortunately, the agency has ignored them in order to carry out a system of performance standards or goals, being hypnotized by the numbers instead of what they should be looking at. Those appropriate management tools are to hire enough people, not just more judges, assign sufficient support staff to each judge, not just more support staff; equip the offices better with such primary things as recorders, word processors so they can be utilized effectively by all staff, rather than having them stand in line to use them.

These are all legitimate activities that could be carried out by management if they discarded their emphasis on the numerical performance standards. If that were done we would certainly see a better prepared decisional record, and we would see that the quality of the work done by the judges would increase, because they would have control over it.

After all, we are not paying judges to produce numbers. We are paying them, and very well, to make sure that due process and fairness is afforded to the claimants. That is their goal and their mission, and they must be free to carry it out. The question is raised as to relocation of the judges in the Social Security Administration hierarchy, if that perhaps would improve matters. The American Bar Association has not taken a position on that. It is rather new. But I think it would be rather obvious if that were done you would have to have some specific prohibitions that would prevent the difficulties from occurring again.

Everything we are complaining about happens because the judges are housed in the agency. GAO said they want standards of performance for the judges and, if that is so then we must be removed from the agency because under the APA, the agency cannot evaluate administrative law judges. So as judges we would have to be taken away from the agency.

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The American Bar Association supports the unified corps legislation proposals that have been made and are now in the Senate in S. 594 and in the House as introduced by Congressman Austin Murphy.

I would just like to conclude by saying I think we have enough evidence here of the problem as well as in a book "Judges Bureaucrats and the Question of Independence," and the "Report of the Federal Court Study Committee" which are all substantial evidence that major reform is needed in the way of a unified corps.

[The prepared statement and attachment follow:]

STATEMENT OF JUDGE CHARLES N. BONO, AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the subcommittee: My name is Charles Bono, and I currently serve as Vice-Chairman of the National Conference of Administrative Law Judges, a section of the Judicial Administration Division of the American Bar Association. I am honored to appear today on behalf of the American Bar Association. I am a former President of the Association of Administrative Law Judges, Inc. I serve as an Administrative Law Judge for the Social Security Administration in Kansas City.

I appreciate the opportunity to testify with respect to the issues the Subcommittee outlined: performance targets in the Office of Hearings and Appeals, "Reconfiguration," and whether there should be organizational changes made to effect removal of the administrative law judges from the Social Security Administration and place them in an independent corps of administrative law judges, or leave them within the agency and attempt to ensure their proper independence by other means. It is the view of the American Bar Association that the first two issues are simply evidence of the need for Congress to establish an independent corps of ALJ's. While there are various formulations of this concept, it is a proposal which the ABA studied for a number of years before endorsing overwhelmingly. Thus, while we have not adopted particular policies on performance targets and so-called reconfiguration, it is our view that they are only issues because a corps has not been created -- and it should be promptly to overcome these symptons of attacks against the decisional independence of ALJ's in the Social Security Administration, and indeed, throughout the government.

As our Conference is made up of a large number of administrative law judges who are presently employed by and housed in the Social Security Administration, we have a vital interest in your deliberations. Additionally, the reminder of our membership consists of both federal and state administrative law judges. They as well have a vital concern in the problems as illustrusted by the example of the Social Security Administration Hearings and Appeals process, which is the largest corps of administrative law judges employed by any agency.

The subject of performance targets as employed in the Office of Hearings and Appeals (OHA) was addressed in the study by the General Accounting Office (GAO) issued in December 1989. That report confirms that conflicts between OHA management and the administrative law judges is of long standing, and has in significant part been caused by OHA's insistance on setting monthly decisional disposition goals, and/or quotas, to be accomplished by each individual administrative law judges. The issue of performance targets has divided management and the administrative law judges since 1975. The performance targets in that respect have ranged from 26 decisions per month per judge in 1975, 40 to 45 in 1982 to the present 37 per month. These performance targets are confirmed to have been determined principally by the workload being divided by the number of administrative law judges in service at the time.

Our Conference by letter dated March 1, 1990 to your committee commented on the particulars of that GAO report, and disagreed with its ultimate recommendation to the agency that it conduct a study to determine the appropriate number of cases an administrative law judge should be expected to decide. In sum, we view the evidence as establishing that the practice of setting monthly disposition goals to be achieved by administrative law judges individually has a miserable track record. Not only is there little proof that such practices have had any significant effect in increasing production, but there is ample proof that such practices have in fact caused so much trouble.

To the uninformed it may seem that an agency's simply setting a performance target, such as a monthly disposition goal per judge to be achieved, is harmless. After all, if it is done in the interest of efficiency, how can it do any harm? The problem is and has been that it is not that simple in the Social Security Administration's Office of Hearings and Appeals. When we speak of performance targets we do not mean establishing legitimate goals, and pursuing legitimate means to achieve them. Rather, in the Social Security Administration, and particularly for our consideration here today, in the Office of Hearings and Appeals we are speaking of quite a different matter.

Performance targets in OHA are attended by a panoply of management devices, and coercions to achieve their accomplishment. You have, or will hear of many of them here today. The GAO report touched on some, but certainly not all of the tactics the agency has been using to enforce these artificial targets. Unfortunately, GAO concluded in its report, after implying that the agency has been arbitrarily fixing the numerical monthly disposition goals expected to be achieved by the judges, that the agency should conduct a "study to determine the appropriate number of cases that ALJs should be expected to decide." For the reasons stated in our letter of March 1, 1990 on the GAO report, this recommedation misses the entire point. Even if the recommendation is carried out by the agency nothing will change! The conflicts and tensions will continue. Not because of the number that is set, but rather because a number is set at all.

It should not be a mystery to anyone why the administrative law judges correctly think then decisional independence is undermined by being required to ajudicate cases based on numerical considerations. Numbers have nothing to do with fairness. Each case should be decided on its own merits, processed based upon its own character and content. Extraneous considerations of how many cases on the average a judge must dispose of, hear, or decide in a given period of time to help achieve some pre-stated average disposition goal, quota, or performance target, have nothing to do with the judges's handling of the case. Indeed, the American Bar Association's guidelines for Judicial Performance Evaluation does not include the number of cases handled or meeting some pre-determined goal of a number of cases disposed of in the substantive standards. However, the substance of the decisions, the fairness of the judge, the knowledge of the law and the need for prompt disposition of cases are the hallmarks.

Numerical performance targets such as monthly disposition goals being set by the agency is not the only issue. Everything the agency did to try to force the judges to accomplish those goals is also germane. One of the administrative actions the agency implemented was to remove individual support staff members assigned to individual judges who were supervised and directed by the individual administrative law judge in a unit system, and place them in a pool support staff system which has come to be called "reconfiguration". It was one of a series of administrative devices implemented to gain control of all members of the support staff so that control of how and when the work was done could be dictated by agency management officials, rather than by the individual judges. This step was of course necessary to ultimate accomplishment of a numerical disposition goal, as many of the judges were opposed to the judging by the numbers policies.

Today the implementation of "Reconfiguration" is complete in most offices in the nation. The judges are effectively removed from supervisory or control authority over the support staff. The effect of this system has been as negative as has been the setting of numerical performance targets. Most of the judges believe that this removal of authority and control from them has adversely impacted their ability to direct the manner and method of processing the case they are assigned to. The implementation of this system obviously deprives the judges of the tools necessary to do their job.

The origins of the reconfiguration system were in a 1976 proposal of the then Associate Commissioner Robert Trachtenberg who reportedly perceived the judges had too much autonomy and control when he could not achieve the quota of 26 decisions per month. He even referred to the unit systems as "fieldoms". He devised what was called a "hearing office manager" position GS-13, and attempted to implement it. Significantly, the judges organization recognized the impact of that implementation would be the removal of their necessary supervisory authority over their staff and transfer of it to the hearing office manager. Although Mr. Trachtenberg relented and did not implement it at that time, succeeding associate commissioners have liked the idea, dusted it off and implemented it gradually under other names with the culmanation of "reconfiguration" being implemented in 1984.

So, we see we have more than just performance targets. We have a conflict between agency officials, and the judges over the issue of who controls the business of the judges -- namely, the fair disposition of cases concerning real people. Control issues are of course often the life blood of government bureaucrats. The result in OHA has been the removal of authority and control from the judges by the agency and a depositing of the control in other non-judge personnel supervisors.

More and more supervisory personnel positions have been implemented with greater cost. At the same time non-supervisory support positions have had to be reduced leaving fewer people to do the work, and more and more people to tell everyone how to do the work. Thus, reconfiguration has had not only a negative effect on the morale of the judges, but has left them helpless and dependent on agency managers who determine what work will or will not be done when the judge directs it. Thus, and quite simply, we recommend that a support staff system such as the previous unit system be restored so that the judges will once again have control of the way the work is done, and fewer supervisory personnel will be needed, with the resulting savings.

The history of the conflict in the hearings and appeals system leave little hope that reform of a meaningful nature is possible in OHA while the administrative law judges continue to be housed in the agency. While removing numerical performance standards and restoring the unit system have been recommended as possible solutions, certain realitics must be faced. The system as it now exists is so conditioned and oriented to reconfiguration, and number games being played, that there is little liklihood that such changes, even if implemented, would last. Indeed, such changes will logically be resisted by those supervisors who would lose positions, and these agency management bureacrats who perceive any such restoration of the judges authority as a personal affront to their philosophies that judges are after all only employees -- not the independent fact finders envisioned by the Administrative Procedure Act.

For example, recently the Commissioner of Social Security expressed her concern that there had been too much emphasis on number performance standards. She announced that the numerical performance standards had been suspended. Reportedly, in spite of that suspension, elaborate tracking records are still being kept of the numerical performance of each. They are still being informed that they may have the number standards reintroduced if they dare let their production fall. For all intents and purposes the employees

still are aware of the numerical performance standards. Indeed, in the Commissioner's memo suspending the standards she points out it is only until "further notice".

It should also be remembered that this suspension is only with respect to official numerical performance standards and has nothing to do with the monthly disposition goals per month set for the judges. There has been no official suspension of these performance targets, because the agency denies they were ever official to begin with and were not controlling. Thus, the Commissioner's suspension of numerical performance standards only applies to the support staff personnel. This illustration, of how hard this concept of management by the numbers' dies, serves to prove a more major reform is needed.

In the draft copy of the report of the Federal Courts Study Committee, a blue ribbon panel of members of Congress, judges and lawyers recently authorized by Congress and appointed by the Chief Justice of the United States it is stated, "While many of SSA's more controversial practices have been withdrawn or modified, these attempts to dictate results have left a lingering climate of tension and hostility at OHA. Citing a publication entitled, "Judges Bureaucrats and the Question of Independence, "the report quotes, "At the least this study has demonstrated that management-minded bureaucrats and APA-admonished ALJs cannot live under the same roof and that the current situation is a disservice to the people."

The final report of that Federal Courts Study Committee, issued April 2, 1990, culminating 15 months of study recommends, "to ensure the Administrative Law Judges independence, Congress may wish to consider creating an independent agency in the executive branch to employ all administrative law judges in the Federal government."

The American Bar Association advocates the separation of administrative law judges from the agencies, into an independent "unified corps." The ABA Conference of ALJ's published in 1987 a monograph reviewing proposals to centralize the federal government's employment of administrative law judges which was prepared by Judge Earl Thomas, who is now the Chair-Elect of the Conference, Administrative Law Judges: The Corps Issue. I would ask that this study be included in the printed record of this hearing.

At present, proposed bills providing for such separation are S.594, introduced by Senator Howel Heflin, and H.R. 1179 introduced by Representative Austin Murphy. It would seem appropriate, with all of the information compiled, to conclude that this proposed legislation should move forward quickly. Indeed, the Senate bill has been the subject of Judiciary Committee action, and delaying tactics of Senator Grassley. It is our hope this bill will soon be approved.

In the interim, there may be other steps we can take.

At present there are proposals to separate the Social Security Administration from the Department of Health and Human Services. Proponents of this legislation argue that the problems in the administration of the Social Security Administration, which have resulted in so much criticism and unrest, are attributable to the "politicization" of the Social Security Administration by reason of its being part of the Department of Health and Human Services. That of course is part of a larger problem involving the entire operations of the Social Security Administration, and not simply related to the operation of the Office of Hearings and Appeals.

Nonetheless, under consideration for inclusion as part of such proposed legislation are provisions to establish a separate Office of Chief Administrative Law Judge which would appropriately administer the administrative law judges and the hearings and appeals process system. A Chief Judge would be appointed to be responsible for the other judges. Proponents of that measure believe this will afford a modicum of relief for many of the problems we address by putting a judge in charge of judging.

Our Conference is considering such proposals. We are aware that the Association of Administrative Law Judges has previously testified before your subcommittee in favor of such proposals. However, at this point the ABA has not adopted a position on this proposed legislation.

We would conclude by pointing out that even if such reorganization takes place establishing such a Chief Judge, so long as the administrative law judges of the Social Security Administration are left within the agency a better job of safeguarding their independence will have to be done. This would require clear protective provisions designed to insure appropriate APA protection of the judges. We would also urge the Office of Personnel Management to stringently enforce such protective provisions and police observance by the agency, if the judges remain within the organizational structure of the agency.

Mr. Chairman, I conclude where I began: the various problems within OHA, and indeed throughout other agencies, of protecting the decisional independence of ALJ's can only be definitively resolved through the prompt creation of a Federal Corps of Administrative Law Judges.

Thank you for your attention and courtesy. I will be happy to answer any questions you may have.

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AMERICAN BAR ASSOCIATION
National Conference of Administrative Law Judges
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

CHAIR
David I. Harford
825 N. Capitol Street, N.E.
Chambers 926
Washington, DC 20426
(202) 357-0514

CHAIR ELECT
E. Earl Thomas
2815 S. Andrews Avenue
Suite 605
Ft. Lauderdale, FL 33301
(305) 524-5880

VICE-CHAIR
Charles N. Bono
10 E. 116th Terrace
Kansas City, MO 64114
(816) 426-6186

SECRETARY
Donald B. Jarvis
130 Dewey Boulevard
San Francisco, CA 94116
(415) 557-1601

EXECUTIVE COMMITTEE
THE OFFICERS AND
John M. Vittone
Immediate Past Chair
1111 20th Street, N.W.
Suite 700
Washington, DC 20036
(202) 653-5057
David I. Agatstein
One Main Street
Room 221
Brooklyn, NY 11201
(718) 797-7064
William Bateman
1111 E Newspaper Street
Washington, DC 20068
(202) 162-0740
Daniel C. Beck
25901 Greenleaf Road
Suite 430
Oak Park, MI 48237
(313) 968-0800
Kathleen T. Ryan Davey
10 Causeway Street
Room 617
Boston, MA 02222-1092
(617) 565-3062
E. Milton Frostberg
1805 Friars Road
Unit 2116
San Diego, CA 92110
(619) 557-6179
Marie C. Bellamy Johnson
600 N. State Street
Suite 45250
Chicago, IL 60610
(312) 751-3827
Parlen L. McKenna
4015 Wilson Blvd.
Arlington, VA 22203
(703) 235-3782
Judy Rabinovitz
7 Parkway Center
Suite 290
Pittsburgh, PA 15220
(412) 644-4771
Richard J. Suppe
2000 L Street, N.W.
Suite 712
Washington, DC 20554
(202) 632-7219
Robert Wallace
1375 K Street, N.W.
Hamilton Building
Suite 1122
Washington, DC 20005
(202) 633-0569

DELEGATE TO IAD COUNCIL
John M. Vittone
1111 20th Street, N.W.
Suite 700
Washington, DC 20036
(202) 653-5057

DELEGATE TO ABA HOUSE
OF DELEGATES
Nahum Litt
P.O. Box 19241
Washington, DC 20036
(202) 653-5052

BOARD OF GOVERNORS LIAISON
William H. Colditzer
101 1st National Bank Bldg.
Helena, MT 59624
(406) 442-8560

STAFF DIRECTOR
Diane Livingston
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5701
ABAnet: ABA151

March 1, 1990

The Honorable Andrew Jacobs, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

Re: GAO/HRD 90 15 Issued December 7, 1989
Report to the Chairman Subcommittee on Social Security, Committee on Ways and Means, House of Representatives.

Dear Mr. Chairman:

The National Conference of Administrative Law Judges (NCALJ) is a section of the Judicial Administration Division of the American Bar Association. It has many members who are Administrative Law Judges (Judges) who are presently serving in the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA). As Vice-Chair of that organization I respectfully submit the following information for your consideration.

The issues addressed in the above referenced GAO report pertaining to the continuing controversy and conflict in OHA are of vital concern to the Judges in OHA, as well as to other members of our Conference who are Judges for other Federal agencies. Although you requested the investigation by GAO in October 1987, the report was not released until December 7, 1989. In spite of the long time taken in preparation of the report, it does not deal with all of the issues you listed, and treats primarily the subject of the causes of the recent conflicts between OHA management and the Judges.

A thorough and complete examination of the issues addressed by GAO, and the other issues not addressed by GAO because of the brevity of the report, may be found in a report submitted to the Disability Advisory Committee of SSA by the Association of Administrative Law Judges (AALJ). The statement of AALJ dated May 1, 1989 includes recommendations for resolutions of many of the problems of the hearings and appeals process. It is attached hereto as Tab A.

The issues of numerical monthly disposition goals and "reconfiguration", addressed by GAO in its report as the two primary causes of the conflict and controversy between the Judges and OHA management, are described in more detail in that document. The additional information should be of use to your subcommittee to better understand the history and depth of the continuing controversies.

The remainder of this letter will address the GAO report itself and certain of its troubling aspects. To begin with, the title of the document, "Many Administrative Law Judges Oppose Productivity Initiatives", is unfortunate. It certainly conveys a bad impression of the Judges and places them in a bad light. To conclude that any group is opposed to "productivity initiatives" places that group at a disadvantage. The implications of the title are obvious. It is unfair and untrue. As one Judge commented on learning of the title, "You might as well say that the Judges are opposed to the American Flag or apple pie as to say that. Besides, it is untrue."

A careful review of the history of this problem will reveal that the Judges in OHA have not opposed agency actions that are truly "productivity initiatives". The Judges have been primarily responsible for the increasing number of monthly dispositions. The Judges have opposed only erroneous agency actions that attempt to treat the hearings and appeals process as an assembly line or a widget factory. That the agency chooses to characterize the ill-advised agency actions as "productivity initiatives" should not conceal the true facts. It will be seen that the agency actions the Judges have opposed do not deserve the title of "productivity initiatives", and, in fact, have been disincentives and counter-productive.

Importantly, it should be noted that the Judges' opposition to the ill-advised agency actions, which it likes to call "productivity initiatives", has been applauded and commended by the American Bar Association and recognized by committees of Congress, and the court, as contributions to protect the integrity of administrative adjudication.

For example, such efforts were recognized in an unprecedented award ceremony given by the President of the American Bar Association in New York City at Lincoln Center in August of 1986. The plaque presented to the President of the AALJ recognized the continuing efforts of the Judges in OHA in their valiant efforts to protect the integrity and fairness of the hearings and appeals process and specifically stated:

> THAT THE AMERICAN BAR ASSOCIATION HEREBY COMMENDS THE SOCIAL SECURITY ADMINISTRATIVE LAW JUDGE CORPS FOR ITS OUTSTANDING EFFORTS DURING THE PERIOD FROM 1982 - 1984 TO PROTECT THE INTEGRITY OF ADMINISTRATIVE ADJUDICATION WITHIN THEIR AGENCY, TO PRESERVE THE PUBLIC CONFIDENCE IN THE FAIRNESS OF GOVERNMENTAL INSTITUTIONS AND UPHOLD THE RULE OF LAW.

Such an award would hardly have been given to a group of Judges who "opposed productivity initiatives". The title chosen by GAO is, therefore, inappropriate and will do little to encourage reform by the agency.

Aside from the wrong impression the ill-advised title gives, there are other troubling aspects of the information, and lack of it, in the GAO report itself. The history of the long-continuing conflict between the Judges and OHA management over monthly disposition goals and quotas per Judge is not adequately treated. That information is reliably preserved in the records of Congressional hearings on the subject held, first in 1979, and continuing in hearings held in 1981, 1982, 1983, 1985 and most recently in 1988.

The agency's practice of setting monthly disposition goals per month per Judge began in 1975. The then associate commissioner of Social Security established a numerical monthly disposition goal of 26 decisions per Judge. The monthly disposition goals and/or quotas set and the attendant enforcement policies indulged in by the agency, led to a firestorm of controversy, filing of a lawsuit against the agency by five Judges, and ultimately lengthy hearings before this subcommittee in 1979.

The agency did not fare well as the result of those hearings. The staff of the subcommittee, in its report, concluded that agency officials had sacrificed the quality of justice and due process in pushing the monthly disposition goals and/or quotas. In addition, the report titled the agency as being one "at war with itself." In that same year, the litigation filed by the five Judges was settled by agreement which has come to be known as the "Bono Agreement".

GAO fails to disclose, in its report, the specifics of the "Bono Agreement". It refers to the agreement in only the most general terms. It should have disclosed that a paramount provision of the agreement was that the agency would stop setting monthly disposition goals and/or quotas in the number of decisions a Judge should issue. The purpose of the agreement was to restore peace to the operations of the hearings and appeals process. The record will reflect it did for the period the agency stopped that unpopular practice. The failure of the report to disclose this vital information impairs the utility of the report and impacts on the recommendation made at the conclusion of the report for reasons which will be later set forth.

It is troubling to note that in spite of the existence of the "Bono Agreement", an associate commissioner, Louis B. Hays, reinstituted the monthly disposition goals and/or quotas in 1982. He, in fact, testified before the Subcommittee on Social Security, in 1982, that he set the "goal" at 45 decisions per month. By this action the agency began again the practice that has caused so much controversy and trouble.

GAO reports, based upon what the agency said, that the agency did not have a need or use for monthly disposition goals and/or quotas during the years 1984, 1985 and 1986. In these years, however, numerical standards of performance were still in effect for all members of the support staff, and hearing office monthly disposition goals were used as well. It is, therefore, not accurate to state that monthly disposition goals and quotas were not operative during those years.

Apparently, the agency does admit that it reinstituted monthly disposition goals in 1987, 1988 and 1989. These "goals" were per Judge, and were: 35 dispositions for 1987, 37 dispositions for 1988, and 37 dispositions for 1989. These figures can be found on page 15 of the GAO report in Table 2.1 - ALJ PRODUCTION NEEDED TO MEET DEMAND FOR HEARING REQUESTS. GAO discloses that the agency determined the numerical goals it set by simply dividing the number of requests for hearing by the number of Judges on hand. The goals were determined by arbitrary mathematical calculations and did not consider other important factors bearing on what number of decisions a Judge can, in fact, issue per month.

It is apparent from the facts disclosed in the GAO report that the agency re-established monthly disposition goals per month and expected the Judges to meet them in the year 1982 and through 1989. This disclosure establishes the agency has been in violation of the "Bono Agreement" for those years, and still is. It is obvious that the recent conflict and controversy in OHA between the Judges and OHA management is based, in part, upon the reinstitution of those monthly disposition goals and such conflict continues to the present day.

Information that an agency of the Federal government is in violation of one of its contractual agreements and that the violation is causing conflict and controversy is essential to the understanding of the problem. It, as well, bears on the "reasonableness" of the agency's actions in insisting upon these monthly disposition goals.

The other cause of controversy addressed by the GAO report is "reconfiguration". It, as well, has a long history dating back to the associate commissioner in 1975 who set the first monthly disposition goals or quotas of 26 decisions per month per Judge. That associate commissioner also introduced a "hearing office manager" position that was designed to take control and have authority over all members of the support staff that had been previously managed and supervised by the Judges. The position was not implemented because of strong opposition to it by the Judges in 1975 and the years following. A provision of the "Bono Agreement" deals with that controversial issue. The agency agreed to take the matter under advisement and not implement it in response to the litigation and settlement thereof in 1979.

The ensuing years, however, found the agency implementing that position and establishing "pooled support staff operations." The agency removed support staff from assignment to the Judges, and made them subordinates to agency management officials called Hearing Office Managers, Hearing Office Administrators, etc. Importantly, with these changes, the Judges no longer supervised their employees or rated and evaluated their performance. Ultimately, the evolutionary product of the Hearing Office Manager position came to be titled "reconfiguration".

Virtually all of the organizations of Judges opposed "reconfiguration". The AALJ, the Federal Administrative Law Judges Conference (FALJC) and NCALJ lodged protests with the agency over this system. The problems caused were addressed in the testimony at the aforementioned Congressional hearings. The hearings dealt with this problem, but the confusion surrounding the complex systems and the fact that its resolution would have required Congress to intervene in the management affairs of the agency made it difficult. As the extent of damage done was not yet established at that time, Congress expressed reluctance to intervene in the day-to-day office management affairs of the agency. The GAO report establishes that the program has indeed been a major cause of the declining morale. At least 68% of the Judges believe that the system has had a negative impact on the operations of the offices. Time has, therefore, proven that the reluctance of Congress to take action in this matter must be overcome.

The Judges and the organizations have opposed "reconfiguration" for very good reasons. Making Judges dependent on a "labor pool" makes the process unwieldy and capable of little control by the Judges, if any. A discussion of the "reconfiguration" problem is contained in Tab A and should be referred to. The recommendation of the Statement of the AALJ to solve this problem is the reinstatement of the "unit system" described in that document.

GAO makes no recommendation as to how to solve the "reconfiguration" problem. It simply concludes management likes the system and the Judges don't. Although there are references to assurances by the agency that each office organization structure is "voluntary", a closer examination of the information in the report bears out that the Judges have nothing to say about the office organizational structure. The "reconfiguration" system is in place in 95% of the offices. The system was imposed in 1984 by the associate commissioner of OHA in spite of the protests lodged by the groups identified above and maintained in spite of the Judges' overall dissatisfaction with it.

It is unquestionably established, by the report, that the monthly disposition goals and "reconfiguration" are the root causes of the continuing controversy and declining morale of the Judges. GAO

seemingly excuses, however, those agency actions by calling them "productivity initiatives" and concludes that they were effective in increasing the "productivity". It is not certain how GAO arrives at the conclusion that the increase in productivity was caused by monthly disposition goals or "reconfiguration". There are many other factors that enter into the productivity increases reflected and they are not considered by GAO. Additional support staff, new word processing equipment, streamlined processing methods, agency policies which permitted increasing numbers of cases to be dismissed and/or remanded with little processing, are among a few of the other factors. They could have, as easily, accounted for the increase in productivity referred to.

A review of the statistics does not even support the conclusion that there has been a significant increase in the decisions issued per month per Judge. The greatest increase in productivity per Judge occurred in the years 1979 through 1981, before "reconfiguration" when the agency was not using monthly disposition goals and abiding by the terms of the "Bono Agreement". This clearly illustrates that monthly disposition goals and "reconfiguration" were not necessary to have significant production increases.

The only recommendation GAO has made as the result of its study is:

> "We recommend that the SSA Commissioner direct OHA to conduct a study to determine the appropriate number of cases that ALJs should be expected to decide. In its determination, OHA should give proper balance to the quality of decisions. The results of such a study should be used as a basis for establishing reasonable monthly production goals."

The recommendation asks the agency to engage in a futile pursuit. Since 1975 the agency has been trying to do just what GAO recommends. The results have been devastating to the reputation of the hearings and appeals system for fairness and to the morale of the Judges employed in the system. The survey results recited by GAO, in its report, clearly support that conclusion. The monthly disposition goals have ranged from 26 to 45, as reflected by the production table in the report. Controversy has ensued no matter what the number has been and for good reason.

The nature of the work done by a Judge does not lend itself to statistical reporting or determination. The quality of justice cannot be quantified. The recommendation GAO has made will predictably cause the agency to do much busy work to establish a new database from which to argue that it has determined a "reasonable number". It will, nonetheless, be nothing more than a number. Numbers are easier to

administer. The natural temptation of any administrator is to believe that everything can be reduced to numbers and averages. It is highly unlikely that OHA will come up with any number outside the range of numbers that have already been utilized by the agency as a monthly disposition goal per Judge. How will a new number cause any less problem? The answer is it won't.

The above considerations militate to the conclusion that a "reasonable" number in a monthly disposition goal cannot be determined. There are so many factors to consider in arriving at such a figure. Many of them are impossible to factor into any reliable equation. GAO expects the agency to factor into the equation "quality" as well. This further confounds the undertaking.

The cases heard by the Judges and decided by them are not fungible. Each case is unique from the other involving different individuals, different evidence, different witnesses and different volumes of material to consider. To think that you can mix all of these variable factors into an equation, to come up with a "reasonable" number of decisions that the agency has the right to expect a Judge to issue each month on the average, is being unreasonable. Even if a number is determined in OHA, the Judges have no control whatsoever over the work flow as is illustrated by "reconfiguration". The Judge is, therefore, in most respects, helpless in being able to attain the goal set because others can effect the number of decisions he or she issues each month. The impossibility of the situation should be evident to those who would see.

Given these very important considerations, GAO's implications that such a number can be used as a basis to determine what the agency has the right to "expect" from its individual Judges, raises other serious concerns. Is GAO's recommendation based upon its long held philosophy that Judges should have standards of performance and be rated and evaluated by the agency in which they are employed? GAO concedes that the Administrative Procedure Act (APA), "in order to insure decisional independence of the Judges", prohibits rating and evaluating of the performance of the Judges by the agency. By its recommendation, however, it urges the agency to establish a standard it has a right to "expect" its Judges to meet.

What will the agency do with the monthly disposition goal that GAO asks it to determine it has a right to expect from its Judges? If it does, as it has done in the past (as recorded in the records of hearings on this issue, and as alleged in the lawsuits brought by the five Judges in 1977 and by the AALJ in 1983), the conflict and controversy will continue unabated. If the agency is not to use the figure at all,it would appear that the attendant expense in establishing a database

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would be unjustified. The APA should not be trifled with as it has been. GAO's recommendation will tempt the agency to believe that its actions have been proper and that it should continue on the course of setting monthly disposition goals and coercing the Judges to meet them.

The "Bono Agreement", as well, prohibits the agency from continuing the setting of monthly disposition goals and quotas per Judge. The terms of that agreement were designed to bring the agency back into compliance with the APA and keep it there. The recommendation will encourage continued violation of the "Bono Agreement" as well as the APA.

In conclusion, it is clear that GAO missed the point. A reasonable monthly disposition goal, in numbers, cannot be determined, and even if it could, both the APA and the "Bono Agreement" prohibit the agency from using such a goal as it has in the past and as it is continuing to do.

The solution of the problems does not lie in the recommendation of GAO, but rather in the thirteen specific recommendations found in Tab A.

Respectfully submitted,

Charles N. Bono
Vice-Chair

Attachments

Chairman JACOBS. Judge Bernoski.

STATEMENT OF HON. RONALD G. BERNOSKI, SECRETARY, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

Mr. BERNOSKI. Thank you.

I am an ALJ with the Social Security Administration in Milwaukee, Wisconsin.

I offer our written statement into evidence. I will summarize my testimony.

I appear as the secretary of the Association of Administrative Law Judges. The need for legislative reform of the Social Security hearing process has been clearly established by multiple congressional hearings, Federal decisions, independent studies, findings of the inspector general of the HHS and recently by the Federal Court Study Committee.

The report of the Federal Court Study Committee probably best summarizes the systemic problems with this process as follows:

> Recent experience suggests that the process is vulnerable to unhealthy political control. SSA has made controversial efforts to limit the number and amount of claims granted by ALJs leading to widespread fears that the judges' proper independence has been compromised.

Mr. Chairman, the problem with this hearing process is directly related to the continued efforts of the agency to assert undue influ-

ence on the judges and thereby interfere with their decisionmaking.

This undue influence has two basic roots. First, the obsessive concern for monthly production quotas and second the management policy to remove the control of the support staff from the judge. This policy has resulted in a lesser work product and low personnel morale. Both of these results have been confirmed by the findings of the recent GAO report.

The effect of this agency's mismanagement is further seen in the massive number of Federal court remand orders and the proliferation of class actions of this agency.

These programs impact on the claimants by a delay in benefits and a loss in the faith of the hearing system. The agency's implementation of the interference with the judges takes several forms but generally relates to case production. For example, action has been brought against judges, judges have been counseled against awarding too many cases in favor of the claimant. Judges have been denied transfers. There have been threatened office closings, judges have been placed on permanent travel status, one chief judge was prohibited from accepting an American Bar Association award. There is a statement in the record from the Lansing, Mich., judges that the office would be closed unless production increased.

There are allegations that a regional chief judge issued 400 Medicare decisions without a single hearing. There are inferences and statements from other judges that are in the record on this subject.

This association has been requesting formal recognition from the agency as a professional association during the past year. During the past years we have been given de facto recognition including funding of our joint meetings. We respectfully ask the committee to inquire why the agency is now withholding this formal recognition despite the fact that we meet requirements for the same. We hope this action by the agency is not in response to our genuine and sincere effort to help Congress improve the Social Security hearing process. A member of the committee, Congressman Brown, has been kind enough to send a letter on our behalf in this matter. Recently we received a notice dated May 31, 1990, from the Associate Commissioner restricting our activities with Congress. It mentions fines, imprisonment, and discharge. We consider this a gag order and it will preclude our future communication with Congress on reform.

The GAO's final recommendation to suggest a study to determine proper case goals is flawed because it violates current personnel law and violates the APA.

In our statement we have suggested several methods for reform of the Social Security hearing process. We suggest the selected method must place the chief judge in charge of the Office of Administrative Law Judges and he or she must be responsible to the appointing authority.

The judges must be protected from undue agency influence by law. We recommend that the Appeals Council be reformed into a meaningful appellate tribunal. We recommend that the agency's policy of nonacquiescence in Federal court decisions be altered by legislation as stated in the Federal Court Study Committee report.

We believe these reforms will develop a meaningful hearing process for claimants.

Mr. Chairman, I have several letters I would like to introduce into the record. I think the committee will find them interesting to the extent that they do show claimant concern in the hearing process. The first is a letter which was sent by a claimant to an ALJ in September 1988, which talks about the hearing process and his hearing. He states that if this person who is going to be a judge at the hearing is an employee of Social Security, the hearing will be a waste of time and money and I will be better served to take this appeal to my elected official.

Another is a letter to Senator Packwood in August of 1986 where the claimant talks about the hearing process. He says:

> I am now told by Social Security that in 3 months I can state my claim to a Federal judge. He will decide as to whether or not I am disabled. This judge is an employee of the Social Security system. To date I have not been notified.

This shows the concern of claimants in the system as presently structured with a judge as part of the process that has denied the claim and now he is before the judge who is paid by the same system. They have some concern. I have had people during hearings express the same fear to me.

Also, the excessive concern with numbers, I have two things here. First there is a national ranking with a star, showing the number of national rankings and also ranking the regions. I would offer these into evidence, Mr. Chairman, and like to have them made part of the record.

Chairman JACOBS. We will be happy to make them part of the record.

[The prepared statement and attachments follow:]

STATEMENT OF RONALD G. BERNOSKI, SECRETARY, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

I. INTRODUCTION

Mr. Chairman:

My name is Ronald G. Bernoski. I am an administrative law judge assigned to the Office of Hearings and Appeals for the Social Security Administration, sitting in Milwaukee, Wisconsin.

I appear before you in my capacity as the Secretary of the Association of Administrative Law Judges, Inc., which is a professional organization having the stated purpose of promoting due process hearings to those individuals seeking adjudication of controversies within the Social Security Administration and the Department of Health and Human Services.

II. THE NEED FOR REFORM IN THE ADMINISTRATIVE HEARING PROCESS

The case for reform of the Social Security Administration Hearing Process and the structure of the Office of Hearings and Appeals has been clearly established. The long standing conflict and controversy within the Office of Hearings and Appeals caused by placing the administrative law judges within the Social Security Administration is well documented; Congressional hearings in 1975, 1979, 1981, 1983 and 1988; numerous federal court decisions; the recent study completed by the Government Accounting Office (GAO) and the report of the Federal Court Study Committee have clearly established that the problems are systemic. These Congressional Hearings, decisions and reports have clearly demonstrated that the agency lacks an appreciation for the role of administrative law judges as independent decision makers within the agency. The GAO report specifically found low morale among the administrative law judges as well as the support staff. The background materials for the Federal Court Study Committee stated: "Such tension is inevitable in a system which houses supposedly independent adjudicators within a misoriented department."

In 1983 the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs in the United States Senate conducted a hearing which inquired into the role of the administrative law judge in the Title II Social Security Disability Insurance Program (S. PRT. 98-111). The Committee issued its findings on September 16, 1983 which provided in part as follows:

> "The principal findings of the Subcommittee is that the SSA is pressuring its ALJs to reduce the rate at which they allow disabled persons to participate in or continue to participate in the Social Security Disability Program".

The Committee found that the Social Security Administration was focusing its review principally on the administrative law judges with high allowance rates. The Committee further found that the agency was increasing the rate at which administrative law judges were expected to decide cases (the disposition rate), and thereby reducing the quality and quantity of time that an administrative law judge had to devote to each case and further lessening the opportunity for the judge to develop additional evidence which may support an allowance decision. The Committee further found that the agency was enforcing administrative law judge conduct which reduced allowance rates and increased disposition rates through memos of praise for such activity. The Committee found that the agency was limiting the decisional independence of the administrative law judges through the use of Social Security rulings and a policy of selected non-acquiescence in Federal Court decisions.

The Committee stated that the agency had unjustifiably and inequitably focused its efforts on the administrative law judge allowance rate and administrative law judges with high allowance rates in such a way as to result in less impartial hearings for some disability claimants.

The Committee recommended that the Bellmon Review Program be stopped immediately and that the appropriate response was to legislate reform in the adjudicative process.

The conclusions of the Committee are set forth in part as follows:

> "The APA mandates that the ALJ be an independent, impartial adjudicator in the administrative process and in so doing separates the adjudicative and prosecutorial functions of an agency. The ALJ is the only impartial, independent adjudicator available to the claimant in the administrative process, and the only the person who stands between the claimant and the whim of agency bias and policy. If the ALJ is subordinated to the role of a mere employee, an instrument and mouthpiece for the SSA, then we will have returned to the days when the agency was both prosecutor and judge."

In the case of Association of Administrative Law Judges, Inc. v. Heckler, 620 F. Supp. 1123 (1984) the Court found that the Social Security Administration had implemented the Bellmon Review Program in a manner that pressured judges to issue fewer allowance decisions. The Court stated as follows:

> "The evidence, as a whole persuasively demonstrates that the defendants retained a justifiable preoccupation with allowance rates, to the extent that the ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been largely on subjective factors, as a matter of common sense, that pressure may have influenced some outcomes."

In the case of W.C. v. Heckler 629 F Supp. 791 (1985) the Court held that the Bellmon Review Program was void and ineffective because its implementation violated the Administrative Procedure Act. This was based on the finding that the Bellmon Review Program, which targeted high allowance administrative law judges for review, was a substantive or legislative-type rule which was subject to the notice and comment provisions of the Administrative Procedure Act which was not properly followed in its implementation.

In the case of Salling v. Bowen, 641 F. Supp. 1046, (1986), the Court granted a permanent injunction in enjoining the further use of the Social Security Administration Representation Project. The Court stated as follows:

> "We have seen that the administrative procedures in making Social Security disability determinations are a cumbersome 'Rube Goldberg' process at best, which have been further incumbered by a threat to the independence of the ALJs who are the only people in the entire system who are oriented towards the main goal which should be the seeking of truth and the ultimate triumph of justice. This experimental administrative program has been improperly implemented from its inception in violation of the Secretary's Public Regulations...."

The recent report of the Federal Courts Study Committee addressed the problems in the Social Security Administration Hearing System. The report stated as follows:

"Recent experience suggests that the process is vulnerable to unhealthy political control. The Social Security Administration has made controversial efforts to limit the number and amount of claims granted by the administrative law judges, leading to widespread fears that the judges' proper independence has been compromised. (And the Appeals Council of the Social Security Administration lacks even the protection that the Administrative Procedure Act gives the administrative law judge.)"

In a study titled Judges Bureaucrats and the Question of Independence, D. Cofer demonstrated that management-minded bureaucrats and APA - admonished judges cannot live under the same roof and that the current situation is a disservice to the American people.

It should be noted that even the Department of Health and Human Services has questioned the wisdom of having the judges employed by the same agency whose cases they decide. In a May, 1981 Management Oversight Review Report on the Office of Hearings and Appeals and the Social Security Administration, the Office of Inspector General found that the appeals process could be more effectively located outside the Social Security Administration. The report highlighted the appearance of impropriety and the incongruity in having one arm of the Social Security Administration making the basic eligibility determinations in cases while the office of Hearings and Appeals arm of the Social Administration adjudicates that decision. It went on to question the wisdom of the arrangement of putting the Office of Hearings and Appeals under the direction of an Associate Commissioner because the Social Security Administration staff controls the resources, space, equipment and supplies of the Office of Hearings and Appeals which, if restricted, could indirectly control the number and quality of the hearings held.

The interference in the hearing system by the agency has eroded the very fiber of this process and has reduced the quality of the work product and has decreased the trust the claimants have in the hearing process.

The fundamental problem in the Office of Hearings and Appeals, as currently constituted, is that the responsibility and accountability for the entire hearing and decisional process is placed upon the individual administrative law judge, yet the judges are given no authority to carry out this

mandate. As some of the Committee members may be aware, some years ago the Office of Hearings and Appeals made a managerial decision to take away from the administrative law judges all supervisory authority over hearing office support personnel, including staff attorneys, decision writers, clerical support staff and typists. The result of this office configuration is that administrative law judges do not have the power to expedite the preparation of written opinions and/or the issuance of decisions once the case has been decided. Authority for case control, resource improvement and management has been given to an ever enlarging group of non-legally trained bureaucrats who have no understanding of the concepts embroiled in the Administrative Procedure Act or the concept of administrative due process. This has led to confusion and a work product of lesser quality for this agency which has resulted in more federal district court remands of its decisions and a longer processing time for claimants.

The need for reform in the Social Security hearing system is apparent. This legislative reform is necessary to provide the claimants with an administrative hearing system which meets the constitutional requirements of a fair hearing.

III. SPECIFIC INCIDENTS OF UNDUE AGENCY INFLUENCE

The conflict between the agency (OHA) the administrative law judges has been of long standing and relates back to the 1970's. The basic underlying cause for this problem has been the obsessive concern of the agency for high monthly disposition rates by administrative law judges and its management policy which has removed the control of the support staff from the judge (reconfiguration). These policies have resulted in a lesser work product and low morale among both judges and staff. The poor work product is revealed in the massive number of federal court case remand orders and the proliferation of class action lawsuits. Most of these class actions have been brought as a result of the refusal of the SSA to follow established circuit court law or its own regulations. This action has resulted in hundreds of thousands of cases being reheard by administrative law judges. The agency has not been deterred by the negative results from its policy and has continued to force it upon the judges, often using techniques which were punitive and contrary to federal personnel law (see Title 5, U.S.C., Sec. 7521) and the Administrative Procedure Act.

Specific incidents of undue agency influence are stated as follows:

(a) Attempts by the agency to remove two judges for the sole reason of failing to meet agency production quotas (see SSA v. Goodman, No. HQ 75218210015, MSPB April 6, 1983, remanded Fed. Cir. 33 MSPR 325 (1987) and SSA v. Balaban, No. HQ 75218210014, MSPB February 9, 1983, remanded Fed. Cir. 33 MSPR 309 (1987). The agency did not prevail in either case and was ordered to pay substantial attorney fee awards to each judge.

(b) Several judges from the Ft. Smith Arkansas Hearing Office were summoned to Washington, D.C. and advised that, "no peace" would occur in that office until they substantially reduced their reversal (allowance) rates. These judges were also notified that they would be required to report to the Regional Chief Judge and Deputy Chief Judge for "peer counseling".

(c) During the trial of the case of Association v. Heckler, 620 F. Supp. 1123 (1984), testimony was received that the Associate Commissioner of OHA had planned to implement a "behavior modification" program for judges who had a higher than acceptable reversal rate. This plan was never implemented.

(d) In the case of Association v. Heckler, Ibid, Judge Green found that the "Bellmon Review" program was implemented in a manner that made judges feel pressure to issue fewer allowance decisions. This review program violated the Administrative Procedure Act, according to the holding in Nash v. Brown, 869 F. 2d 675 (1989), because it interfered with pending decisions.

(e) A former Associate Commissioner of OHA initiated a case production policy which was implemented by the Regional Chief Judges by sending letters which described the production policy to each judge in their respective regions. The production quota was first set at thirty-five cases per month for each administrative law judge. This quota was later increased to thirty-seven cases per month for each judge. This program was being implemented while the agency was steadfastly denying that it had either a monthly production goal or quota policy for administrative law judges.

(f) Until recently, the agency had a monthly production quota of forty decisions for the decision writers. This was implicitly a quota for the administrative law judges because they had to first hear and decide the cases to have them available for the decision writers to draft.

It should also be noted that the decision writers are given credit for the decisions when they are in the first rough draft. Since the judges have no control over the writers, this policy has resulted in a work product of lesser quality. The judges have in many cases been forced with the choice of correcting the work product themselves or by signing a lesser quality decision.

(g) Subtle pressure has been placed on judges to discourage them from performing their responsibility to have medical experts or vocational experts present at the hearing or from completing either prehearing or posthearing development of the evidentiary record. The purpose of this agency policy was to shorten the processing time of the case and to expedite its handling. It completely ignores the fact that the judges have the responsibility to perform these functions and that the failure to do so is reversible error. When the case is returned on appeal, the ultimate processing time is much longer than it would have been if the case had been handled properly in the first instance. The result of this agency effort is delay for the claimant.

(h) Despite the fact that a Federal Circuit Court held in W.C. v. Heckler, 629 F. Supp. 791 (1985), that the Bellmon Review Program was invalid because it was adopted contrary to the notice and comment requirements of the Administrative Procedure Act, the agency continued to implement a program of this type. This program, which was known as "quality review" was described by Mr. Jay Ogden to the officers and directors of this Association at one of its annual board meetings. He stated that selected decisions of administrative law judges were reviewed by non-lawyer analysts who assigned a rating scale to each decision (100% was a perfect score). Mr. Ogden further

that the percentage assigned to each judge was not accurate, but when the percentages were assigned to a hearing office as a whole, they became accurate.

These quality review scores were used in at least one documented situation regarding the selection for the Hearing Office Chief Judge for the Hearing Office in Fargo, North Dakota. The use of these scores in this manner is clearly contrary to federal personnel law which prohibits the use of performance appraisal ratings for administrative law judges (see Title 5, U.S.C., Sec. 4301 (2) (D)).

(i) A judge in the Providence, Rhode Island hearing office had his local hearing docket removed and was placed on permanent travel status in an attempt to increase his monthly case production. This action by the agency became the issue of a hearing conducted in Providence, Rhode Island by the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee. This action against the judge was not implemented and he was not placed in permanent travel status.

(j) In 1988, a judge in the Fort Worth, Texas hearing office was removed from his position as Hearing Office Chief Judge without notice while he was on vacation. This removal came shortly after he had prepared a survey for this Association to sample the opinion of the judges concerning their views on problems within OHA including the possibility of litigation to redress the grievances.

(k) A judge in one of the hearing offices in Chicago, Illinois was denied his request for a transfer to the hearing office in Buffalo, New York (his hometown). He was advised in writing by the Chief Judge that his request was denied because his monthly case production rate was not high enough. This judge had an average monthly rate of case disposition of 32.4 for the calendar year 1988. He was described by his hearing office Chief Judge as a "fine" judge who works hard and is caring and concerned.

(l) A judge in the New York region was denied annual leave to attend a war veterans convention. This leave had been previously approved and was then orally denied on the eve of his departure.

(m) A judge in the New York region received an emergency phone call from his wife, who was in Florida, requesting that he fly from New York immediately. He proceeded to cancel three days of hearings, notifying claimants and expert witnesses in sufficient time to prevent undue expense to either. In his haste to make arrangements, he forgot to complete and hand in a request for leave slip. Although the entire office staff was aware of his family emergency, upon his return he was notified that he had been charged with being absent without leave. In a memorandum from his Regional Chief Judge, dated January 20, 1989, he was charged with having cancelled hearings and leaving the office without having prior approval from the hearing office Chief Judge and for further causing inconvenience to the claimants, attorneys and witnesses.

This judge has a good attendance record and takes very little leave time (in fact he lost eight hours leave because he had more than he was permitted to carry over).

(n) In a memorandum from the Regional Office of Region V, the Flint, Michigan hearing office was notified that all cases originating in its northern most service area (Saginaw and Bay City) were being transferred to the Detroit hearing office. The rationale for this decision was that it would reduce the processing time of pending cases. The memorandum also stated that the Flint judges were not rendering enough case dispositions. This latter assertion was not true and the Flint office was in fact in the middle of the rankings for the disposition of cases by office in Region V. Subsequent to this memo, the personnel in the office were on one hand being assured that this action was not a precursor to the closing of the office, and on the other hand were requested to submit a list of the other Region V offices to which they would accept a transfer. It is the opinion of the judges in this office, that with

approximately one-half of the case load now being transferred to another office, they will be placed on regular travel dockets (in an attempt to increase their productivity). The Detroit judges will be required to travel to Saginaw and Bay City to hear cases previously heard by the Flint judges, while the Flint judges will be required to travel elsewhere. This appears to be an unnecessary expenditure of government funds.

The Saginaw and Bay City Social Security Bars expressed concern about this situation. When they did, officials from the regional office contacted the attorneys by phone to attempt to ascertain who in the hearing office had disclosed the information.

The outcome of this action by the regional office is still pending a final resolution.

(o) Administrative law judges in the federal system are often required to travel to hear cases in remote locations to equalize the workload in other hearing offices. In recent years, travel has become a means to impose punishment upon judges in one form or another. For example, in the summer of 1987 two judges in the Providence, Rhode Island hearing office were notified that they would be placed on permanent travel status to increase their case productivity. This was attempted by applying the directives of a former Chief Judge contained in a memorandum dated September 25, 1986.

A deliberate attempt has been made by the agency to increase the case production of other low producing judges by placing them in travel status under this memorandum which contains weekly production quotas (yet the agency still denied that it had monthly case production goals or quotas for judges).

The judges were also often encouraged to travel on their own time contrary to federal travel regulations.

(p) Several so-called "low producing offices" including San Rafael, California, Eugene, Oregon, and Lansing, Michigan have been denied

replacement support staff as punishment for their production record which has resulted in additional delays for claimants.

(q) The agency, at one time, attempted to control the contents of the decisions of the judges by discouraging the citing of federal case law precedent.

(r) A judge in the Oak Park, Michigan hearing office was charged with "willful disregard of his duties and responsibilities, ..." when he cancelled a hearing trip because his travel advance did not come through (charges dated December 2, 1988 to the MSPB by the then Associate Commissioner). The facts of this case merit discussion because they show the extent the agency will go to intimidate its judges. The judge was assigned a travel docket to Escanaba, Michigan and the cases were originally scheduled for the week of November 13, 1988. However, an attorney representing ten of the claimants requested a postponement as he was to be out of town during the scheduled week. The judge granted the postponement and rescheduled the hearings for the week of November 27, 1988. The judge notified all the parties of the change and he rearranged his travel accommodations. On November 1st, he requested a travel advance on the appropriate form, and forwarded it to the regional office within the time frame suggested. On November 23rd, he still had not received his advance of funds. An administrative aide in the hearing office attempted to ascertain what had happened to the travel advance. On the same day, she (the aide) was informed by the regional office that they could not find the travel request (they presumed it to have been lost in a recent move of the regional office). As this was the day before the Thanksgiving holiday, and travel was to commence Sunday, November 27th (on the judges off-duty time), it was urgent that some direction be given by the regional office. Yet none was forthcoming. To complicate the matter, the judge has just expended over $2,000 on repairs to his personal automobile and did not have sufficient funds to advance for travel. After discussing the matter with his

Hearing Office Chief Judge, and being told to "do what he wanted to do" the judge decided to postpone the trip. His hearing assistant notified all parties that afternoon and informed them that the trip would be rescheduled as soon as possible.

After the action had been commenced against this judge, a settlement official was appointed by the administrative law judge assigned to the case by the MSPB and a settlement agreement was effectuated between the parties. The administrative law judge approved the settlement agreement and submitted a recommended decision to the MSPB where the case has been pending since May 1989.

(s) Several judges in the Oak Park, Michigan hearing office have been subjected to abusive, profane and unprofessional language by a former Chief Judge of Region V.

(t) There are pending allegations that production statistics have been inflated in Region V by using retired judges. This case inflation is a accomplished by having retired judges hear cases and then credit this case production to a hearing office without assigning the retired judges to the office as a matter of record. This technique inflates the mathematical averages for the judges assigned to the hearing office. There are also allegations that a former Chief Judge of that region adjudicated 469 Medicare cases without a single hearing.

These allegations are extremely serious and require further investigation.

(u) The agency prohibited the Chief Judge from receiving an award granted to the administrative law judges of this agency by the President of the American Bar Association in August of 1986. The award recognized the valiant efforts of these judges to protect the integrity and fairness of the hearing process.

(v) Probably the most bizarre circumstance has arisen in the Lansing, Michigan hearing office. In that situation the former Chief Judge of Region V has threatened to close the hearing office, take action against low producing

adequate support staff. There are allegations that the judges have been confronted with vile, crude and abusive language by the former Chief Judge of that region and the former Associate Commissioner.

This turmoil has all occurred after January 1989. Prior to that time, this office functioned without any particular problem or confusion.

During a telephone conference on January 10, 1989, the then Chief Judge stated that action would be taken against low producing judges and that this action would affect their service area, staffing and personnel transfers.

There are further allegations that a judge was designated as Acting Hearing Office Chief Judge. His mission was to increase the production of the office. He suggested that an increased number of cases could be scheduled for hearing by placing an incorrect address on the Notice for Hearing thereby assuring that the notice would not be delivered and the hearing would in fact not be conducted and that a second method for accomplishing a similar result would be to manipulate the data placed in the HOTS (computer) system.

A new Hearing Office Chief Judge was selected to "control" this office, but when he concluded that the complaints of the judges were meritorious, he was also subjected to crude and abusive language because of his findings.

This incident is particularly bizarre because the judges in this office are producing a reasonable number of cases according to the regional office standards when their staff ratio is considered. There is also no underlying personal or professional problem that would account for this action against this hearing office.

This fact situation is now pending in a case before the MSPB where the judges have caused an action to be filed against the agency requesting administrative relief.

These are very serious allegations and require additional investigation because they go to the very heart of the integrity of the hearing process. If conduct such as this exists on even a small scale, it could lead to the destruction of this hearing process. These are the types of allegations that "scream out" for legislative reform of this hearing system.

(w) A judge from the Providence, Rhode Island hearing office has been denied his repeated request for a transfer to the Boston Hearing Office. The Boston office has not had a full assignment of judges and recently several judges with less tenure have been assigned to this office. The judge who has been denied this request for a transfer comes within the administration classification of a "low producing" judge and he is an officer of this Association.

(x) This Association has been requesting recognition as a professional association from SSA for a considerable period of time. The SSA currently extends this recognition to the district office managers organization. We have not received this recogniton to date, but are hopeful it will be forthcoming in the future.

The agency policy of monthly disposition rates for judges is not consistent with the Administrative Procedure Act. The Nash case, Ibid., held that goals are acceptable but fixed quotas violate the Administrative Procedure Act. The court did not provide a particular definition for either "goal" or "quota" and the common usage of each term is thereby employed. The dictionary definition of a "goal" is "the end toward which effort is directed" and the definition of a "quota" is "the share or proportion assigned to each in a division or to each member of a body" (Webster's New Collegiate Dictionary). The GAO report (GAO/HRD-90-15, at p.-18) found that the agency has been setting case disposition rates for administrative law judges since the 1970's by dividing the monthly workload by the number of full-time judges. This action, as found by the GAO, completely fits within the definition of a "quota". This case law and GAO investigation finding clearly establishes that the agency case disposition rate for judges has been in violation of the Administrative Procedure Act since this policy was adopted.

IV. GENERAL ACCOUNTING OFFICE REPORT

The General Accounting Office (GAO) conducted an investigation and prepared a report in response to a request of the Chairman of the Subcommittee on Social Security, House Committee on Ways and Means. The Chairman requested the GAO to determine the causes for recent conflicts between OHA management and the administrative law judges and whether a reduction in staffs, especially in administrative law judges, adversely affected the adjudicative process.

In December 1989, the GAO completed its report which is entitled "Many Administrative Law Judges Oppose Productivity Initiatives" (GAO/HRD-90-15).

The title of this report is unfortunate, because it implies that administrative law judges oppose work and productivity. The record of this Association and the administrative law judges clearly establishes a history of promoting programs and initiatives that would improve the productivity of judges while preserving the fairness and integrity of the hearing process. We have been steadfastly opposed to any program that compromises the independence of administrative law judges or the fairness of the hearing system for claimants.

The efforts of the administrative law judges of this agency to protect the hearing process for claimants were recognized in an award presented to the judges by the President of the American Bar Association in August 1986. The award was accepted by the President of this Association and it acknowledged the effort of the judges in protecting the integrity of the hearing system. The award specifically stated:

> "That the American Bar Association hereby commends the Social Security Administrative Law Judge Corps for its outstanding efforts during the period from 1982-1984 to protect the integrity of administrative adjudication within their agency, to preserve the public confidence in the fairness of governmental institutions and uphold the rule of law."

The GAO report stated that a majority of administrative law judges characterized the general level of their office morale as low. Seventy-five percent of these administrative law judges cited excess emphasis on productivity as contributing to a substantial extent to the low morale. The report also stated that judges opposed the "pooling" of their office staffs and that this "reconfiguration" had a negative affect on the operation of their offices. A majority of the

judges further reported that recent reductions in the support staff had resulted in longer processing times and a poor work product. About one-half of the judges stated that current monthly production requirements have had a negative impact on their work. These findings confirm the longstanding assertions of this Association that the programs of the agency for office configuration and case production (numbers) have had a negative affect on the quality of the hearing process with a resulting detrimental impact on the claimants. The GAO failed to develop this aspect of the investigation and did not make an inquiry into the effect of this agency policy on claimants. This omission results in a significant deficiency in the report.

In the case of Graver v. Secretary, 405 F. Supp. 631 (1975), Judge Troutman addressed the issue of production requirements imposed upon administrative law judges. His language is still timely:

> "That the law judge has 'other cases' and that 'we have to dispose of these cases,' does not justify encroachment upon the plaintiff's statutory and constitutional rights of a full, fair, complete and impartial hearing. This Court is also subjected to the constant and burdensome administrative and statistical pressure to 'dispose of these cases' and we too have 'other cases.' While the computer can add and subtract numbers faster and more accurately than the human mind and thus keep the 'pressures' applied, it cannot weigh the quality of justice dispensed under the 'pressures' it creates. The measure of quality goes unstatisticized and unrecorded. But when all cases are up-to-date and all calendars current, we will have gained nothing if justice has not been dispensed and public confidence in our system is destroyed. It will then be too late to revive the process from within the system because those who reacted to and satisfied the demands of the computer are collectively 'the system' and will ill-explain the sacrifice of quality. They will find no refuge in the computer and receive no defense from the administrators dispensing the statistics. This record aptly demonstrates what happens when a judicial officer understandably and conscientiously reacts to unrelenting statistical pressures.... To suggest that justice delayed is justice denied is not the answer. Justice delayed is not always justice denied, and speedy justice is not always justice obtained. Increased pressure on the judiciary resulting from increased litigation because of

> increased use of the courts by our society is an increased burden which must be met by the judiciary alone, without sacrificing the quality of justice dispensed. The resulting pressures should and must be assumed by the judiciary without complaint. However, the additional and sometimes unwarranted pressures emanating from the legislative and administrative forces in the form of faceless statistics spewed out by soulless computers may constitute an unjustifiable burden which the judiciary is not warranted in assuming, tending as it sometimes must to adversely affect the quality of justice. If justice delayed is justice denied, then justice without quality is also justice denied, a result for which the judiciary alone will be held accountable without reference to collateral pressures from whatever source."

Judge Troutman very ably reminds us that "justice without quality is also justice denied." This is exactly where the recent policy of the agency has led us with its office reconfiguration and obsessive emphasis on monthly case production. The result of this policy is further confirmed by the massive numbers of federal court remand orders (which in part shows poor quality work product) together with the increase in class action law suits which in a significant portion reflects the agency's failure to follow existing law or its own regulations.

The GAO report states that Hearing Office Chief Judges in consultation with their Regional Chief Judges are allowed to chose the organizational structure for each office. If this is the current policy, it must be based upon a recent unannounced change, because in the recent past offices in an entire region have been ordered to be reconfigured by the Regional Chief Judge without any consent or input from the hearing offices and numerous other offices were denied needed support staff until they were "reconfigured".

The GAO report states that the monthly disposition goals appear to have been effective in increasing the average monthly disposition of cases per administrative law judge. This finding is not complete because it does not take into consideration the impact of increased support staff and improved office equipment such as word processors and personal computers. The failure to consider these additional factors flaws this GAO finding to a considerable extent.

The GAO report states that the agency has not made a study of the effect of increased case production upon the quality of the administrative law judge work product. This

finding is contrary to the frequently asserted position of the agency that its studies have revealed no adverse effect of increased case production upon the quality of the administrative law judge work product. The GAO report further shows that the monthly production requirements for administrative law judges was determined by the agency by using the unscientific method of dividing the number of cases by the number of judges.

The GAO report recommended that the SSA Commissioner direct OHA to conduct a study to determine the appropriate number of cases that administrative law judges should be expected to decide. This recommendation is confusing because it is inconsistent with well established federal personnel law which provides that administrative law judges are not to be included in performance appraisal systems (Title 5, U.S.C., Sec. 4301). The statute which implements the performance appraisal system, (Title 5, U.S.C., Sec. 4302), states:

> (b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for:
>
> (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria.....;

The GAO report is apparently recommending that the agency develop an objective criteria for rating administrative law judges which is inconsistent with existing federal personnel law.

The GAO report also fails to consider the terms of the "Bono Settlement"(Bono v. United States of America Social Security Administration, No. 77-0819-CV-W-4, W.D. Mo. (1979)), wherein the agency specifically agreed to not establish either goals or quotas for administrative law judges. This settlement agreement is a contract which binds the action of the agency. The GAO report did not discuss the impact of this contractual agreement on the case disposition policy of the agency or attempt to reconcile it with its recommendations.

The failure of the GAO to fully consider the federal personnel exemption of administrative law judges from the performance appraisal system or the impact of the "Bono Settlement" seriously flaws its final recommendation. The GAO failed to recognize that the exemption from the performance appraisal system for administrative law judges

goes to the very heart of the Administrative Procedure Act and is the basis of independent decision making for administrative law judges which results in a fair hearing process for the claimants.

The GAO did not acknowledge the individual aspect of each case. The report failed to recognize that these cases are not "fungible goods" and that each case involves distinct factual and legal issues. The case may not appear important to the casual observer, but to the claimant it is the most important thing in the world and may be the barrier between abject poverty and basic subsistence.

This Association asserts that the final recommendation of the GAO report should not be imnplemented because of its inconsistency with existing law.

V. AGENCY NON-ACQUIESCENCE AND FEDERAL COURT OF APPEALS DECISIONS

The problem of the Social Security Administration's policy of "non-acquiescence" in federal court of appeals decisions has been a long standing problem for this agency. We feel that the policy of the Social Security Administration of non-acquiescence is simply another manifestation of its institutional arrogance. Just as it attempts to impede the power and authority of administrative law judges to control the manner and method by which they hold hearings and render decisions, it also refuses to accept their decisional independence. Likewise, the Social Security Administration refuses to acknowledge the authority and precedence set by the federal circuit courts of appeal. The agency has been given ample opportunity to correct this problem but has refused to respond in a meaningful manner. We believe that Congress should remedy the situation by adopting the recommendations made in the recent report of the Federal Court Study Committee. Congress should pass legislation which requires the agency to abide by the law of each federal circuit has pronounced by its court of appeals. This would allow any conflicts between the circuits to be resolved by the United States Supreme Court and would provide for a healthy growth and review of this body of law. This proposal would also shorten administrative processing time because it would reduce the number of class action law suits brought against the agency. These class actions have historically resulted in hundreds of thousands of cases being reheard by administrative law judges. Most of these class actions have been brought as a result of the refusal of the Social Security Administration to either follow established circuit

court case precedence or its own regulations and have caused long delays for claimants who are often entitled to benefits. In a recent class action the court found "that the evidence depicted a systematic, unpublished policy that denied benefits in disregard of the law." This non-acquiescence policy was characterized as "lawless" by one member of the Federal Courts Study Committee. The policy has caused substantial harm to claimants and should be remedied.

This Association recommends support for H.R. 4797. This Bill was introduced into the House of Representatives in May 1990, and it provides that when the Social Security Administration is unsuccessful on an issue in two federal circuits the Social Security Administration must seek Supreme Court review, and if unsuccessful, follow the decision nationally. This legislative reform is necessary, because the courts are now becoming impatient with the agency's refusal to follow case law precedent. In the case of Wilkerson v. Sullivan, Civ. A. No.84-2548, 2 Ad L 3d 472 (E.D. Penn. August 25, 1989), the court permanently enjoined the Secretary of the Department of Health and Human Services from the policy of "non-acquiescence" in refusing to follow two courts of appeals decisions which held that disability entitling an individual to Social Security benefits may be based on alcoholism standing alone. This decision provides a drastic remedy and clearly shows that legislative reform is required to cure this problem caused by agency policy.

VI. RECOMMENDED REFORM IN THE HEARING PROCESS

The recommended reform for the Social Security Hearing Process at the administrative law judge level, can be achieved by adopting one of several new structures. To be successful, the selected method of reform must insulate the administrative law judges by law from undue agency influence. The reform structure must also establish that the Chief Administrative Law Judge is in charge of the operation of the Office of Administrative Law Judges and is responsible directly to the appointing authority. The agency must respect the spirit and purpose of the Administrative Procedure Act and accept the role of the administrative law judges as independent fact finders. The judges must be permitted to make their findings pursuant to the existing law, regulations and agency rulings.

Several recommendations for reform of the hearing process of the Social Security Administration are more specifically described as follows:

(a) Separate Review Commission
This recommended reform is based upon the minority opinion of the Federal Courts Study Committee Report which proposed the creation of a Benefits Review Board. This structure would consist of a separate Commission appointed by the President with the advice and consent of the Senate. The Commission would appoint the administrative law judges and the Chief Administrative Law Judge. The Office of Administrative Law Judges would be under the operational control of the Chief Administrative Law Judge. This Commission would have jurisdiction over all cases presently heard by judges within the Department of Health and Human Services or such other jurisdiction as deemed appropriate. The Commission would also have appellate jurisdiction over appeals from decisions and orders rendered by administrative law judges.

(b) Office of Administrative Law Judges Under a Social Security Board
This concept differs from the foregoing in that the Office of Administrative Law Judges would be placed directly under the Social Security Board which would be adopted by passage of legislation which creates an independent agency for Social Security. The judges would be appointed by the Board. The Office of Administrative Law Judges would be under the operational control of a Chief Judge who will be responsible directly to the Board.

(c) Office of Administrative Law Judges Under the Secretary of the Department of Health and Human Services
Another reform structure would be to create an Office of Administrative Law Judges (as described in b above) and place it directly under the Secretary of the Department of Health and Human Services. This approach is legally more sufficient than the current administrative hearing process within the Social Security Administration. The current structure is not appropriate because the Social Security Act places the responsibility for the Administrative Hearing Process in the Secretary. To best execute this mandate, the Office of Administrative Law Judges should be placed directly under the Secretary because the cases

are adjudicated by the judges as the delegate of the Secretary. This proposed structure creates a direct line of responsibility from the Office of Administrative Law Judges to the Secretary as contemplated by the Act.

This Association recommends that this reform structure be patterned after legislation introduced into this Congress by Senator David Pryor (S.1571).

(d) Unified Corps of Administrative Law Judges
Perhaps the ultimate solution would be to create a separate corps of administrative law judges which would be given jurisdiction over all administrative hearings, not unlike the judicial structure found in U.S. District Courts and most State Courts. This concept would envision specialty by assignment to the various agencies utilizing administrative law judges and APA Hearings. This system would provide greater flexibility to best serve the needs of those agencies requiring administrative law judges now in place or emerging.

A bill to establish a Unified Corps of Administrative Law Judges has been introduced into the Senate by Howell T. Heflin and is now pending before the Senate Judiciary Committee (S.594).

The above recommended reform proposals all contemplate that the administrative law judges will be appointed under Title 5, U.S.C., Sec. 3105 with full Administrative Procedure Act protection. This legislative reform is necessary to provide the judges with a decision making process which is free from undue agency influence which results in a fair hearing process for the claimants.

VII. RECOMMENDED REFORM IN THE SOCIAL SECURITY APPEAL PROCESS

A minority opinion in the final report of the Federal Courts Study Committee recommended a reform structure for the Social Security administrative hearing process system that would abolish the Appeals Council and replace it with a Benefits Review Board constituted to provide a review process for administrative law judge decisions. This Association

recommends that the Committee consider implementing this recommendation by creating a review panel within the Social Security Board created by the Independent Agency Bill. The review panel would consist of a Chief Appellate Administrative Law Judge and Appellate Administrative Law Judges who are appointed by the Board under Title 5, U.S.C., Sec. 3105. The Appellate Judges on this panel would have Administrative Procedure Act (APA) protection and they would render determinations upon orders and decisions of administrative law judges which have been appealed to the Board for review. The APA protection for the Appellate Judges would eliminate the undue agency influence which currently plagues the Appeals Council (which concerned the Federal Courts Study Committee) and would convert this appellate body into a meaningful review tribunal. This review also addresses a recent report of the Administrative Conference of the United States (Recommendation 87-7) which recommended that either the quality of the administrative review of the Appeals Council be improved or it be abolished. Since the quality of review of this body has not improved, it should now be abolished as an archaic organization that has outlived its usefulness. If the independent agency concept is not adopted, the review panel should be created within the Office of the Secretary of the Department of Health and Human Services.

The preferred appellate structure would be to adopt a system modeled after the proposal of the minority opinion in the Federal Court Study Committee. This system would provide for an independent review commission constructed on the model of OSHRC or the NLRB.

ASSOCIATION OF ADMINISTRATIVE
LAW JUDGES, INC.

Ronald G. Bernoski

Melford O. Cleveland
President
by Ronald G. Bernoski, Secretary

Winchester Bay, Oregon
September 21, 1988

TO:

Administrative Law Judge.

I requested this hearing, assuming that I would have a hearing by a person that was not an employee of the Social Security Administration, I am not questioning any legal aspects of the case, I only question the fairness of the decisions that have been reached so far.

At the present time I receive only my SS chesk, and a very small service connected disability cheek(2139) and it does not make it possible for me to live very well.

At the time of the alledged overpayment, I made every effort I ciuld to keep my income below the level that I understood was necessary, Icontacted my employer, received permission to reduce my hours, I assumed that this was done my checks came as a direct deposit at my bank, andthe amount was over the allowed amount a very small amount, and I reported as I was told, and lost my whole Social Security check for thoes months.

I feel that the whole reporting process for the first year is very unfair, because after the first year it is computed on a yearly basis, and we are only assesed 1 for every 2 we earn over the set amount.

Since I become 60 years of age, I have had to take minimum wage employment, and I have gladly worked for this because I felt that I was at least doing something usefull, I worked for the, Douglas County Landfill, as an attendent at the Solid Waste facility, and upon leaving there I worked for the Senior Community Employment Program, working in the U.S.Forest Service Parks in this area, but it seemed to me that Social Security doesnt want anyone on SS to be a productive Citizen, in other words if I work for a minimum wage job, I should pay back an alledged overpayment.

If this person who is going to be the Judge at this hearing is an employee of Social Security, the hearing will be a waste of money and time, and I will be better served to take this appeal to my elected officals.

I have been completly honest and above board with the Social Security, and asked that this amount be waived, due to the hardship it has brought on me, and I feel that past interveiws were a waste and if this is to be repeated, I will attend the hearing at no cost to Social Securit , but feel that any meeting with Social Security personell will be fruitless.

Sincerly.

D. James Stuckey
Box 672
Winchester Bay,
Oregon
97467

Manny Fullberg
1868 F St.
Springfield, OR 97477
Aug. 21, 1986

Dear Senator Packwood:

Sir, the social security disability system, allthough federal, really needs looking into in Oregon.

Im 51 years old and they have rejected my claim two times because of the reasons as stated in enclosed summation statement.

After the first rejection my doctor sent them a personal letter reccomending that my claim be reconsidered because of reasons in sumnation statement. I was rejected again. In this second rejection S.S. stated "You are not experiencing ongoing chest pain because of heart disease and you can work!"

I can't work because of chest pain and that why I applied for S.S. disability in the first place. What does it take to get threw to these people?

I haven't been able to work for a year now. I worked 12 years on the job I had before heart attacks. I haven't had any income for six months. Savings are about gone, soon till I have to face loseing my house financed by state G.I. loan.

Now Im told by S.S. that in about 3 months I can take my claim to a federal judge. He will decide as to rather or not I am disabled. ~~The judge is a employee~~ of the S.S. system. No date has been set, I was told I would be notified.

Why should a person becoming disabled have to loose everything they have when the disability program is for such people?

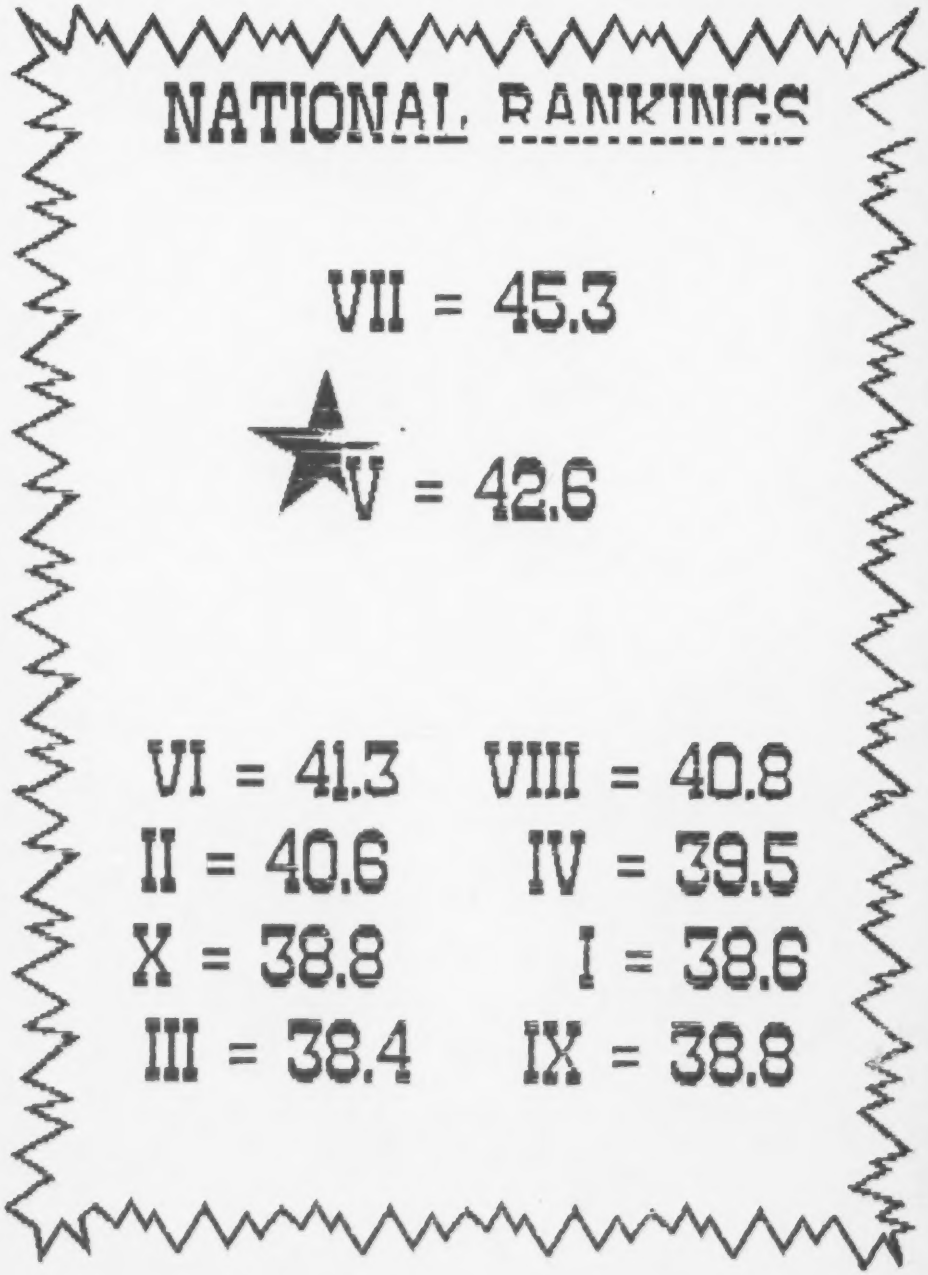
Can you do anything to help in this situation Senator Packwood? I desperately need same.

Sincerely yours
Manny Fullberg

SEPTEMBER 1989 RANKINGS

Region 1 - 38.6
Region 2 - 40.6
Region 3 - 38.4
Region 4 - 39.5
Region 5 - 42.6
Region 6 - 41.3
Region 7 - 45.3
Region 8 - 40.1
Region 9 - 38.0
Region 10 - 38.8

NATIONAL AVERAGE: 40.4



Chairman JACOBS. Mr. Stein.

STATEMENT OF JONATHAN M. STEIN, GENERAL COUNSEL, COMMUNITY LEGAL SERVICES, INC., PHILADELPHIA, PA

Mr. STEIN. Good morning. My name is Jonathan Stein, general counsel at Community Legal Services in Philadelphia where I have worked for 22 years as an attorney and as the executive director.

I would like to speak to an issue that I suggest you hold an entire hearing on in the future: ALJ incompetence and bias. This is not a problem of a few bad apples but a problem in every single office in the country and involves a whole host of problems that Social Security has kept in the closet away from congressional scrutiny and which warrant, I think, a public airing. This is a problem of essentially biased judges who make up their minds before they hear the evidence; biased judges are now the subject of a class action suit in East St. Louis, Ill., to remove a judge, a class action in the Middle Pennsylvania Federal Court and in an unusual petition to remove procedure that we and 25 lawyers and paralegals have filed in Philadelphia to remove an ALJ named Theodore Stephens who was in Detroit, and then got transferred to Philadelphia. We have documented in exhibit A to my testimony in a 55-page complaint the horrendous decisionmaking he has been making for the last 8 years.

The basic problem here is that Social Security has no procedure for dealing with aberrant judges or, in a systemized way of responding to complaints from claimants. So you have a large cadre of ALJs with structural reforms you are now considering but these proposals will go no place unless there are institutional procedures for dealing with bias and incompetence which are wreaking havoc on hundreds and thousands of claimants. The class actions already out there are now being brought essentially on behalf of all the victims of those particular ALJs.

I think your hair will be raised reading the decisions and the behavior of these judges. As a result of these complaints we are now hearing of others from around the country, in Miami, an ALJ who asks claimants to strip their clothing off, and complaints of other ALJs in all parts of the country.

I received a letter from the union of staff attorneys representing staff attorneys who work for ALJs in 96 out of 132 offices. In this letter dated June 4, Kenneth Paulini states, "Daily they see episodes of ALJ incompetence and abuse of discretion that we are largely powerless to remedy." They continually write decisions which they know are not legally sufficient, that don't reflect the evidence in those cases. This is essentially an ignored problem. I have copies of this letter which I would like to make part of the record and hand up to the committee after this hearing.

If I could get to a number of reforms which we think are necessary to deal with these problems, first, there needs to be better screening of judges before they get hired. There needs to be consultation with the American Bar Association and other local bars and the legal aid offices in those areas to determine whether particular judges have anticlaimant bias or pro-Government bias. That is apparently not done currently.

Second, the veterans preference essentially discriminates against women lawyers, almost barring them entirely. There are only about 30 or so women ALJs of over 600 or 700 ALJs in this system. This is shocking. It means that older women claimants who often have medical problems that white male doctors and ALJs may not be sympathetic to, face essentially an all male, white judiciary which lacks the diversity of both women lawyers and other male

minority lawyers who are also virtually nonexistent from this cadre.

I think the veterans preference here just has no place where the goal is really to find the best and most competent judges. Certainly this needs to be addressed by the agencies.

Third, there needs to be limitations on tenure. ALJ burn out is extraordinary. Even conscientious judges have come into this job and, seeing the most tragic, painful cases year after year, become desensitized. Those who come in with bias will become worse over time. There should be a limit on tenure. This should not be a life time job. Remember U.S. magistrates have an 8-year limit subject to renewal. If there is a renewal and reappointment process, then there should be a full review of judges who want to seek renewal of their term after a 5- to 8-year period.

We think also, there needs to be an independent review procedure to deal with complaints by claimants. Claimants have no place to turn to. We had no place to turn when we put together the 60-page complaint against Stephens in the Philadelphia area.

No one in Social Security and their Office of Hearings and Appeals responded to these outrages so we began to document until we put together a 60-page complaint, until Congressmen Thomas, Foglietta, and Bill Gray, and Senator Heinz wrote to the Secretary, until we filed this petition and, until the media publicized it, was the first time they took our complaint seriously.

Now this same judge is still sitting on our own cases even though we have this complaint against him because he refuses to recuse himself. Social Security never has had in its entire history a real complaint procedure for claimants and representatives to seek review of the competency and bias of ALJs.

Our last two suggestions go to an internal check on ALJs' needs so they are not dependent on claimants who are often uncounseled or unrepresented, an internal check to determine competency. The agency relies on recusals by judges when they are claimed to be biased, but ALJs never recuse themselves in these circumstances. The agency never reviews the arbitrariness of these recusals.

My last point is that I think Congress has a role to demand evidence from the agency of all complaints against ALJs, pending disciplinary actions against them, whether they are going to take any action on any of the recommendations I have offered in this testimony, whether they intend to reopen adverse decisions of ALJs who are accused of bias and provide a remedy for the victims who lost because of those ALJs.

I commend this committee to seriously consider having an entire hearing on this subject because I don't believe any committee on the House or Senate side has dealt with this issue in a detailed way.

Chairman JACOBS. I infer from your testimony that I erred in addressing you as judge. I stand corrected.

Mr. STEIN. Thank you.

[The prepared statement and the letter referred to, follow:]

STATEMENT OF JONATHAN M. STEIN, COMMUNITY LEGAL SERVICES, INC., PHILADELPHIA, PA

I trust I may offer a perspective on the failings of the Social Security ALJ appeals system that you may not be hearing from other witnesses today. I appear as the General Counsel to Community Legal Services in Philadelphia, where I have worked continuously as an attorney and as the program's past Executive Director for 22 years. I have in the process had regular contact with the hearings system through representation of Social Security claimants. I have also been counsel in recent, successful litigation in the U.S. Supreme Court of a national class action where the Court found the agency to have been violating the Social Security Act, denying hundreds of thousands of low income, disabled children their entitlement to Supplemental Security Income (SSI) benefits since the inception of the SSI program in 1974. Sullivan v. Zebley, 110 S.Ct. 885 (Feb. 20, 1990).

The three major reasons why eligible Social Security and SSI claimants are denied benefits are:

1. The failure to develop evidence and assist claimants in developing needed medical evidence in disability cases (a failure of ALJ's and state Disability Determination agencies, the latter in the anomalous position of never seeing in the person.)

2. The lack of independence of ALJ's and the consequent refusal of ALJ's and indeed all adjudicators in the agency to comply with governing federal court Social Security decisions.

3. The inadequate quality and anti-claimant bias among many adjudicators.

My statement will address this third cause as other reforms, including most of the testimony you will hear today about the necessary independence of ALJ's, will be for naught unless you address the institutional failings in the selection, disciplining and termination of aberrent ALJ's in Social Security's enormous cadre of about 750 Administrative Law Judges:

1. ALJ Incompetence and Bias

SSA has been long keeping in their closets, away from congressional scrutiny, a serious problem of ALJ incompetence and bias against claimants. The recent filing by our office with Secretary Sullivan of a Petition to Remove ALJ Theodore Stephens, and at least two Legal Services filed class actions on behalf of victims of ALJ's in East St. Louis, Ill. (Small v. Sullivan)

(S.D. Ill.) and in the Harrisburg, Pa. area (Grant v. Sullivan), Civ. No. 88-0921 (M.D. Pa.), have revealed the tip of an iceberg that has been buried from view for years.

With regard to ALJ Stephens who sat in Detroit from 1982-86, and transferred to Philadelphia in 1986, a group of 35 lawyers and paralegals in the Philadelphia area filed, after a year's research and documentation, a 55 page Petition to Remove him as an ALJ detailing:

- Bias and Antagonism Against Claimants and Their Representatives,

- Injudicious Demeanor and Behavior,

- Refusal to Comply With Appeals Council Orders,

- Reckless Disregard of Law,

- Distortion of Hearing Testimony and Evidence Favorable to Claimants,

-Misuse of Vocational Experts, and

-Disregard For Agency Regulations, Rulings and Policy

See letter to Secretary Sullivan and Petition attached as Exhibit 'A' to testimony.

Complaints in Detroit and Philadelphia against ALJ Stephens to Regional and Chief ALJ's and to the Office of Hearings and Appeals, and Appeals Council were at best received with sympathy, but were always otherwise ignored. Here was a judge who in summarizing medical reports excises findings favorable to the claimant (Petition, Case A); who regularly refuses to comply with Appeals Council reversals and remanded instructions to him (Pet. Case B); who tells a pain-ridden arthritic claimant that, regarding her testimony on pain, "I don't give a hill of beans" what this pain testimony is (Pet. Case C); who ignores the most basic SSA regulations on evaluating cases (Pet. Case D); who could order a 298 lb., wheelchair bound amputee in a nursing home to appear before him for a hearing which every other ALJ would consider unnecessary and too burdensome for the claimant (Pet. Case G); etc. Stephens' 20% allowance rate, 3 times lower than the 60-66% of his peers, gives a reflection of his incompetence and bias.

Our point here is that for 8 years, SSA ignored this ALJ and complaints about him, and only after we did the research on cases SSA had full knowledge of, and we petitioned the Secretary in an ad hoc procedure we created, and Senator Heinz and Reps. Gray and Foglietta wrote to Secretary Sullivan demanding action (see letters attached as Exhibits "B"), and the press made these matters public, (see articles attached as Exhibit 'C'), did the agency act to investigate (see Secretary Sullivan's and Appeals Council Member White's letters as Exhibit 'D').

But the agency's ad hoc response is proving grossly inadequate: the Secretary and SSA Commissioner continue to permit ALJ Stephens to hear cases, including those where the complaining attorneys appear before him; they have refused to look at his decision-making in Detroit where attorneys have had almost all their Stephens' adverse decisions reversed and where complaints were lodged; and they refuse to look at any cases of abuse where a final decision of the Secretary has not been made (irrespective the egregiousness of the Stephens decision).

It is clear that there are no established procedures in place to review and investigate complaints against ALJs or, equally important, for SSA to initiate its own review and investigation of aberrent judges with anti-claimant bias or showing gross incompetence.

Because of the absence of any checks on abusive judges, claimants have been compelled to bring U.S. District Court class actions in Pennsylvania and Illinois cited above. SSA's response in Grant v. Sullivan was to transfer ALJ Russell Rowell to the D.C./Virginia area, allowing Rowell to wreak his bias on unsuspecting claimants here. Only when U.S. District Judge Muir was about to have his own judicial inquiry into Rowell's bias and incompetence did SSA begin its own investigation. In the Illinois case, Small v. Sullivan, SSA before suit was filed also ignored an ALJ with close to a 5% allowance rate who SSA had successfully swept under the rug until litigation made matters public.

SSA's response has been that their Appeals Council review can correct ALJ abuse and that a regulation allows an ALJ to recuse himself in the face of a bias challenge. The problem is that the Appeals Council has a notorious history of rubber-stamping ALJ decisions; where they reverse, they almost never order an award of benefits; and where they remand, the experience with Stephens is that he simply ignores Appeals Council directives and agency policies, repeating the same errors (see, e.g., Petition Cases B, W,Y,Z). ALJ's like Stephens never recuse

themselves on request even where parties are in an adversary proceeding with him, and SSA fails to review arbitrary refusals of ALJ's to recuse themselves.

2. Lack of Women and Minorities

The Veteran's preference so skews who can become an ALJ that qualified women are virtually shut out: only about 30-35 of the 750 ALJ's are women, a shockingly low figure. This means that the pool of qualified lawyers seeking ALJ positions is greatly diminished, and the uniqure life experiences that women can bring to the office are excluded from cases where women are often claimants seeking benefits. The Veterans preference also impacts adversely on qualified minority lawyers, and indeed other qualified male lawyers.

3. Life Tenure and Burnout

ALJ's are, de facto, most often ALJ's for life under the current system. There are no time limitations on their tenure, yet the work is so specialized, so repetitive, and so stressful - seeing the most chronically ill and tragic of life situations every day - that even sensitive and conscientious judges burn-out and become de-sensitized and cynical. Those like ALJ Stephens and Rowall who appear to start with anti-claimant biases become even worse over time.

4. ALJ Failure to Write Their Own Opinions

Both ALJ incompetence and the high volume of cases (often caused by correctible "front-end" deficiencies in the state DDS agency system), contribute to the notorious, wide-spread practice of ALJ's not writing their own opinions and the widespread use of word-processed boilerplate decisions.

One example from an October 12, 1989 written decision of ALJ Stephens in Philadelphia tells all. On page 4 of the decision, denying benefits to a 45 year old woman suffering from disabling arthritis and the pain from this condition, Judge Stephens includes the following paragraph:

> "Dear Judge Stephens, per the sequential evaluation, I felt it appropriate to deny this claimant through the Grid; this did not change your disposition of "not disabled." I have also, as shown below, put in the Vocational Expert's testimony regarding jobs she could

perform. Thank You Kindly, S.W." (emphasis added)(Decision re: I.B. attached as Exhibit 'E').

Clearly this inadvertent inclusion of "S. W.'s" thoughtful note to the judge reveals that not only did "S.W." author the opinion but he or she assumed the judicial role of actually "deny[ing] this claimant through the [vocational/educational] Grid [regulations]," an evaluation step obviously overlooked by the judge, who presumably had only considered the medical Listings. The judge clearly had abdicated his judicial role, allowing a law clerk (or secretary?) to render an adjudication in a crucial eligibility area. Since the note clearly came to the judge as part of the rest of the opinion (see, p. 4 of Decision) one can assume the staff person, "S.W.," wrote everything, save, perhaps, Judge Stephens' signature on page six. This is all the more shocking since the opinion finds on p.5, ¶3 that the claimant's subjective complaints of pain "not credible" and only the judge, not his staff person, heard this testimony and could properly make a finding on them. This, by the way, is the judge, sitting for 8 years, deciding hundreds, if not thousands of cases, who the Secretary still retains as his employee.

* * *

The reforms needed for these long-standing abuses are in our view the following:

1. <u>Screen Judges Better Before Hire</u>

As with federal court judges, SSA should screen prospective candidates with the local bar, utilizing the American Bar Ass'n, local county Bar Associations, and the local Legal Aid/Legal Services organizations in each county. Specific inquiries must be made into pro-government and anti-claimant bias, and insensitivity and hostility toward the disabled and racial/ethnic minorities, etc.

2. <u>End Discrimination Against Women Lawyers and Widen Pool By Ending Veterans Preferences</u>.

The veterans preference bonus of 5 extra points and <u>10</u> extra points where a prior disability exists, must be ended to increase the pool of qualified prospective ALJ's and to end discrimination against women. A limited pool of white, male lawyers is no way to insure justice for Social Security claimants - the goal of this hearings system. We don't have veterans preferences for federal court judges and we should not for Social Security

ALJ's. Give veterans the benefits they fully deserve, but don't make one of them this virtual life-tenure job which excludes more qualified lawyers and virtually all women candidates.

3. Limit ALJ Tenure to 5-8 Years

The ALJ job is so stressful and so prone to desensitized, routinized decision-making and burn-out, that there should be a limitation on tenure in the position of from 5 to 8 years. After this time, the ALJ should be permitted to rotate to another ALJ position in another federal agency.

In the alternative, if a re-appointment provision is added on, there must first be an independent review of the quality of work and demeanor of the judge, including Bar input as suggested above for initial hiring, before any re-appointment for another fixed limit on reappointments. (The U.S. Magistrate system is a model where Magistrates, who often hear large numbers of Social Security cases for U.S. District Judges, serve terms of 8 years, subject to review and re-appointment.)

4. Complaint and Independent Review Procedures

There is a virtual total void at SSA with no complaint procedures, and no review, even in the current 2 or 3 ad hoc reviews underway, by investigators independent of SSA's Office of Hearings and Appeals where ALJ's are employed.

There must be a formal and very publicized complaint procedure to be initiated by either a claimant or representative, and independent review by someone outside OHA and preferably outside SSA. The independent reviewer must have the power to discipline or terminate the ALJ, and must be required to give the complainant a written and reasoned response to the complaint.

There must also be a provision, which doesn't exist now, for the automatic reopening of all adverse decisions of the aberrent ALJ.

5. Internal SSA Checks

SSA should not wait until outside complaints force it to act. Many claimants have no attorneys who can complain for them and SSA is often in the best position to know of the abuses of an ALJ. SSA must therefore come up with its own procedures for

spotting and remedying abuses of ALJ's beyond Appeals Council review of individual cases.

6. **Review of Recusal Decisions**

SSA currently provides no speedy or effective review of pre-hearing decisions of ALJ's like Stephens who will always refuse to recuse themselves however egregorious the bias or conflict with the party before him. SSA must provide for immediate review of these refusals so that arbitrary refusals can be reversed and fruitless hearing time can be avoided.

7. **Reporting to Congress**

Obviously, SSA has done a good job of keeping this dirty linen in its ubiquitious closets. Congress should demand from SSA reports on:

- all ALJ's against whom there are complaints of any kind pending and any named in any federal court litigation;

- what actions they have taken in the past and are pending against aberrent ALJ's, including full details of cases for removal before the Merit Systems Protection Board;

- what plans they may have to implement any of the above recommendations #1 - 7; and

- what plans they have for reopening all adverse decisions of ALJ's they have found to be biased or incompetent and may be so found in the future to insure a real remedy for the victims of ALJ abuse.

And, we trust that at some time soon, this Subcommittee may schedule an entire hearing just on this subject specifically inviting representatives of ALJ abused claimants to testify, including counsel and victims in the Small and Grant class actions.

Thank your for this opportunity and invitation to testify.

ASSOCIATED STAFF ATTORNEYS
OF THE
OFFICE OF HEARINGS AND APPEALS

National Treasury Employees Union
Chapter 224

Please Reply To:

Kenneth Paulini
President
692 Euclid Avenue
Elmhurst, Illinois 60126

June 4, 1990

Mr. Jonathan Stein
General Counsel
Community Legal Services
1324 Locust Street
Philadelphia, Pennsylvania 19107-5697

Dear Mr. Stein:

Chapter 224 of the National Treasury Employees Union represents over 80 percent of the staff attorneys employed by the Social Security Administration's Office of Hearings and Appeals. We represent the staff attorneys working in 96 of OHA's 132 hearing offices nationwide. I am a staff attorney in a Chicago hearing office.

I recently read an article in West's **Social Security Reporting Service** (May 17, 1990) about your petition to remove Theodore Stephens from his position as an administrative law judge for SSA. I am writing to commend you on your efforts. Staff attorneys serve as legal advisors to SSA's ALJs. We also write their decisions. Our jobs are most like that of law clerks; we are not advocates for the agency. Almost daily we see episodes of ALJ incompetence and abuse of discretion that we are largely powerless to remedy. All too often we see incomplete ALJ case development and ALJ factual findings and conclusions of law that are inconsistent with the evidence of record and with the law. Even when these problems are brought to the attention of ALJs, they frequently ignore our advice. Thus, we regularly find ourselves writing decisions that we know are not legally sufficient. In our experience the problem is in every hearing office in every part of the country.

Unfortunately, most staff attorneys will not go public because they fear retaliation and because they feel it would be useless. Agency management either does not appreciate the magnitude of the problem, fears the ALJ corps influence with Congress, or just does not care. The union has approached OHA management about this problem and we were told that staff attorneys should report ALJ incompetence and instances of ALJ abuse of discretion to our supervising staff attorneys. Even when that is done, no

action is taken. The Office of Personnel Management takes the position that it will not act and it is up to SSA to deal with such problems. My understanding is that the Department of Health and Human Services Inspector General's office also will not intervene, viewing ALJ incompetence as an internal SSA management problem.

In 1989 we had a terrible situation existing in the Eugene, Oregon hearing office with two out of the four ALJs working in that office. One of these ALJs was the hearing office chief judge. OHA management refused to act after we brought the situation to their attention. With the help of Congressman Peter DeFazio, we were only able to have the one ALJ relieved of his duties as the hearing office chief judge. The whole incident has pretty much ruined the careers of the two staff attorneys working in the Eugene office. Both were given less than fully satisfactory performance ratings the next time they were rated. One, a fourteen year employee whose performance was rated as "excellent" the year before, has grieved his rating. The other developed serious health problems as a result of the affair and transferred out of the Eugene office. Fearing the continued deterioration of her health, she has decided not to fight any longer. I believe that she is looking for a job outside of the federal service.

I wish you much luck and success with your petition, but I suspect that the agency will not take any meaningful action. Please be assured that there are many of us inside the agency that care about giving each claimant a fair hearing and a just decision on every appeal.

Very truly yours,

Kenneth Paulini
President

cc: Executive Board
Stephen Keller (NTEU)

Chairman JACOBS. Mr. Dombi.

STATEMENT OF WILLIAM A. DOMBI, DIRECTOR, CENTER FOR HEALTH CARE LAW

Mr. DOMBI. Thank you, Mr. Chairman. I am from the Center for Health Care Law based here in Washington, D.C. I come to the committee to speak regarding what I would term the stepchild of the Social Security ALJs, their responsibility to handle Medicare appeals. The vast majority of cases are Social Security cases. A very small percentage as the GAO report indicates are Medicare part A and B appeals.

Just as the Social Security cases present questions regarding the independence of ALJs, so do the Medicare cases. Mr. Chairman, I believe the Medicare cases present some of the more compelling evidences regarding attempted influences within the HHS over the administrative law judges.

The efforts of the Health Care Financing Administration indicates that they are a fairly sensitive group. They don't like to be criticized. They take it very poorly. They feel the ALJs are just one element of the decisionmaking process. Over the years the ALJs have proven to be probably the best protection the Medicare beneficiary has against an improper Medicare coverage decision, the reversal rates range between 70 and 95 percent depending on the area of the country and the type of case presented.

In my opinion that should be an indictment of the qualities of the initial decisions but the Medicare program seems to think otherwise. In response to complaints regarding the quality of decisions as we felt they were reflected by the administrative law judge reversals, the Health Care Financing Administration has undertaken several attempts to influence the judges.

They have scheduled training sessions in response to complaints that the favorable reversals by ALJs indicate severely flawed initial determinations. This committee has dealt with and Congress has generally dealt with, the Health Care Financing Administration offered the famous "Dial a Judge" system. That would have taken jurisdiction away for the Social Security judges and placed with an ALJ group based in Baltimore, Md., with the idea that 75 percent of the hearings would be handled over the telephone.

The judges would be downgraded in terms of their GS status, they would be paid less, and their qualifications would be less in order to meet the standards for the ALJ. All this in an environment where advocates and health care providers were criticizing the Medicare program for poor initial decisionmaking.

The Health Care Financing Administration has not yet succeeded in establishing their ALJ corps, but they have developed a hybrid of that system, the part B development center. This is a selected group of administrative law judges who are responsible for handling Medicare part B appeals in various parts of the country. It is a centralized unit of case development wherein recommended rulings essentially are prepared by staff to be presented to the administrative law judges in the field.

The beneficiaries and their advocates have expressed that they feel the development center influences the willingness of an individual to accept an in-person hearing. The GAO testimony presented today indicated that part B development center reduces favorable determinations. If you have an-on-the record hearing your chances of reversal are 31 percent as compared to 44 percent with an in-person hearing. That is a significant difference.

The agency dissuades people from asking for in-person hearings. The Health Care Finance Administration may have another opportunity to create the administrative law judge corps and that is the legislation pending in the Senate which would create a separate Social Security Administration. Senator Moynihan's bill does not consider the consequences to Medicare beneficiaries as a result of taking Social Security away from HHS.

We suggest this committee and Congress as a whole keep in mind that when you affect Social Security administrative law judges, you impact on Medicare beneficiaries as well. We would support the idea to create a separate corps of ALJs not controlled by the Health Care Finance Administration. If reportable to anyone, it would be reportable to the Secretary of HHS rather than the Administrator of the Health Care Financing Administration.

Thank you.

[The prepared statement follows:]

STATEMENT OF WILLIAM A. DOMBI, DIRECTOR, CENTER FOR HEALTH CARE LAW

The administrative hearing system for matters in review under the Social Security Act must ensure the competency and judicial independence of each administrative law judge. It is this system that preserves and protects the rights of some of this country's most disadvantaged citizens at their greatest time of need. Included within the persons eligible for hearings before Social Security administrative law judges are over 33 million Medicare beneficiaries throughout the country. Medicare beneficiary advocates, including the Center for Health Care Law, have labored hard over the years to preserve the integrity of the administrative appeals process. Generally, Medicare advocates find that the hearing before an administrative law judge provides the best opportunity for a fair, competent, and unbiased review of the patient's Medicare claim. However, that fair hearing structure has been subjected to intense and continuous pressures within the U. S. Department of Health and Human Services which diminish the independence of the administrative law judges.

While Social Security claims comprise the vast majority of hearings before administrative law judges, a growing number of appeals across the country relate to the Medicare program. Currently, all Medicare beneficiary appeals under Medicare Part A and Part B which meet the jurisdiction requirements are handled by the same administrative law judges responsible for Social Security matters. Jurisdiction is based on the same law, 42 U.S.C. § 405(b) which is incorporated by reference into the Medicare appeals provision which is set out at 42 U.S.C. § 1395ff. With minor exceptions, the regulations governing administrative appeals are also identical. As such, many issues faced by Social Security claimants with respect to the appeals process are shared by the Medicare beneficiaries. Likewise, Medicare beneficiaries share the concerns regarding the independence of the administrative law judges.

Over the past years, several incidents stand out demonstrating attempts by the Health Care Financing Administration to influence and control administrative law judges. As far back as the early 1980s, advocates faced-off with HCFA over the independence of ALJs. Following a congressional field hearing in Connecticut where the quality of Medicare coverage determinations was at issue, the Health Care Financing Administration responded with an overt effort designed to challenge the integrity of the administrative law judges. The evidence demonstrated that over 75% of Medicare appeals which were pursued to a hearing before an administrative law judge, resulted in a reversal of the denial of benefits. When questioned as to the basis for such a high reversal rate, the regional administrator of the HCFA office of the Boston region responded by stating that HCFA was looking into the matter and intended to take appropriate action. That action took place shortly thereafter when HCFA scheduled a training session for the administrative law judges throughout the New England region. Ostensibly, HCFA's reasoning was that the high rate of reversals by the ALJs was due to their failure to properly understand Medicare coverage principles.

Even today, when the administrative law judge issues a ruling favorable to the claimant which reverses the previous coverage denial, the Medicare fiscal intermediary which had issued the original coverage denial reviews the ALJ decision for purposes of issuing a recommendation for an appeal to the Appeals Council. These fiscal intermediaries also develop the advance record for the administrative law judges, often including an analysis of the claims presented in the appeal which was not part of the reconsideration ruling.

Two recent events are even more telling as to HCFA's interest in controlling the outcome of an ALJ hearing. In 1988-89, HCFA attempted to institute its infamous "dial-a-judge" system for Medicare appeals. With this proposal, jurisdiction of Medicare claims would be withdrawn from Social Security ALJs and shifted to a newly created, central unit of ALJs in Baltimore. It was anticipated that 75% of appeals would be handled by these

ALJs over the telephone. HCFA claimed that this system was necessary to speed up the hearing process and to achieve consistency in decisionmaking. However, it was obvious to Medicare advocates that the proposal was intended to control the administrative law judges. First, the ALJs would have been at a lower grade of government employment, with different standards of experience necessary for qualification. Second, beneficiaries would be discouraged from utilizing an in-person system of hearing since the centralized ALJs would have meant a delay in scheduling of hearings. Third, the proposal came at a time when rising coverage denials under the Medicare Home Health Benefit led to an increase in administrative appeals with a near 90% reversal rate before administrative law judges. HCFA was under significant public criticism at that time for its attempted dismantling of the Medicare Home Health Benefit.

Its response to the criticism, consistent with past actions, was to attempt to revise the structure of ALJs presumably to achieve a lower reversal rate in order to defuse the criticism regarding the quality of its initial decisions.

HCFA failed in its efforts to create the dial-a-judge system. Despite the public and congressional unwillingness to accept the dial-a-judge proposal, HCFA has created a hybrid ALJ system for the processing of Medicare Part B ALJ appeals. With Part B appeals, HCFA has centralized claims development of Part B appeals throughout the country at one location in Virginia. The Part B Development Center obtains and organizes all relevant documents and evidence relating the Medicare Part B appeal. The Development Center also analyzes the appeals prior to assignment to the administrative law judge and issues what effectively is considered a "recommended ruling" to the ALJ in the case file. Further, the Development Center has operated in manner which discourages beneficiaries from pursuing an in-person hearing and instead accepting an on-the-record decision issued by an ALJ from the Development Center. Finally, the administrative law judges assigned to Medicare Part B cases come from a small, select group of ALJs rather than all ALJs working on a local basis under the Office of Hearings and Appeals.

The actions by HCFA can only lead to one conclusion: HCFA has and will continue to attempt to interfere in the independence of the administrative law judges. Instead of learning that the ALJ decisions indicate that the quality of initial coverage determinations needs improvement, HCFA blames the ALJs. With this atmosphere of conflict, it is extremely important to maintain the independence of administrative law judges.

Legislation pending before Congress which would create an independent agency for Social Security creates a new opportunity for HCFA to revise the hearings and appeals system to accomplish its goals. With the current proposal subject to debate in the Senate, Medicare beneficiaries would lose access to hearings before ALJs that are responsible for Social Security claims. This legislation does not address the rights of Medicare beneficiaries directly, but the result is a natural consequence of creating a separate agency for Social Security. The Committee on Ways and Means and other House and Senate Committees must consider the Medicare beneficiaries in their actions regarding an independent Social Security agency. If the Medicare claims cannot be heard before the administrative law judges of the Independent Social Security Administration, then a new system which ensures decisional independence must be created for Medicare hearings and appeals. The Center for Health Care Law recommends that legislation be enacted which creates an office of Medicare hearings and appeals with a status separate from the Health Care Financing Administration, reportable to the Secretary of Health and Human Services rather than the Administrator of HCFA. With this system, the legislation should continue to ensure that the beneficiary receive an in-person hearing promptly and that a time and place convenient to the claimant.

RECOMMENDATIONS

To address the issues presented, the Center for Health Care Law offers the following recommendations:

1. If Congress creates an Independent Social Security Agency which has no responsibility for Medicare hearings and appeals, Congress must create an Independent Medicare Office of Hearings and Appeals under the oversight of the Secretary of Health and Human Services. A chief administrative law judge should be appointed by a non-partisan commission with that ALJ serving for a specified term.

2. The operations of the Medicare Development Center should be eliminated or significantly curtailed in order to ensure that ALJs reviewing Medicare Part B appeals are selected at random on a rotational basis from the administrative law judges assigned to hear claims under Part A and located in the region in which the beneficiary presides.

3. On matters related to Medicare appeals, it is further recommended that Congress provide that a beneficiary is entitled to a Medicare Part B ALJ hearing without first pursuing a fair hearing before the Medicare carrier-appointed hearing officer, that the claim determination issued by Medicare provide an explanation of the benefits of pursuing appeals, and that interest payments be awarded to the Medicare beneficiary who succeeds in the administrative appeals system for purposes of reimbursing the individual for the delay attendant to the appeal.

The Center for Health Care Law wishes to express its support for the Committee in its efforts to ensure decisional independence of administrative law judges. Medicare and Social Security beneficiaries deserve a fair administrative appeals system.

Chairman JACOBS. Mr. Cardin.

Mr. CARDIN. Thank you, Mr. Chairman.

Judge Bernoski raises a very interesting point as it relates to the request of the professional association of ALJs for the Social Security Administration to recognize the association and allow it to become a party to some of the suggested changes and evaluating the work of ALJs as well as the process itself.

Mr. Chairman, might I ask unanimous consent that I could ask a question of Mr. Enoff from SSA?

Chairman JACOBS. Without objection.

Mr. CARDIN. It seems to me that is a rather reasonable request. I am wondering if the SSA has a position in that regard.

Mr. ENOFF. It is a reasonable request. As I indicated in our prior discussion, there was some misrouting of mail, et cetera. My staff tells me that their request has not been staffed out. It will be coming forward and will receive appropriate consideration. I don't see any problems with their request to be recognized.

Mr. CARDIN. Thank you.

Chairman JACOBS. Mr. Moody will inquire.

Mr. MOODY. Let me just thank all the participants, and particularly my constituent, Judge Ron Bernoski for being here.

Could you elaborate a little bit on how the current organizational structure impedes the independence of the judges? We have had this conversation before but I would appreciate if you would elaborate a little here.

Mr. BERNOSKI. Yes, Mr. Moody. At the present time the system is set up so that the chief judge is depressed in the structure under an Associate Commissioner who then reports through the Director

of Programs and Policy, Mr. Enoff, through the Commissioner of Social Security.

That structure really insulates the corps, the administrative law judge corps, from the decisionmaker, the commissioner, and places upon the administrative law judges influence of things such as I indicated, the numbers, the disposition of cases, the changing of staffing, et cetera.

The primary decisionmakers in the current structure, are not of a legal training which we feel is absolutely necessary because that is our function, to hear these cases and arrive at a fair, impartial decision for the claimant. But the primary consideration now appears to be more of production, more of numbers and more of efficiency and these two systems are on a collision course in some particular cases.

Now we do understand that efficiency and work is part of our role. We understand that. The record should be clear that we are not against working and working hard. But we are steadfastly opposed to any type of a program that takes away from the decisional independence because that impacts directly on the claimant, falls directly on their shoulders. The Federal courts have indicated that. I cited it in my paper where one judge, Judge Rothman, talks about the fact that if you lack quality in a decision, justice is in fact denied.

There was testimony here about ALJs as far as competence is concerned. I have heard that raised before at hearings. There is a system in place, the Merit System Protection Board, where this issue can be raised. This is an issue that can also be raised on appeal. If a judge is partial or prejudiced as has been indicated here, that certainly goes to the merits of the case and that claimant has been denied the fair and impartial decisionmaker guaranteed by the Constitution.

When we testified at the beginning of this Congress, we suggested a bill which we called the Moody bill which had a peer counseling section in the bill. The peer counseling section was within the Office of Administrative Law Judges and it provided for lay representation on that committee. It was strange that opposition was brought forth by some of the claimant groups. I could not understand that. Two years ago our association presented a peer counseling program to the Associate Commissioner in which we wanted to help to set up a program where there would be peer counseling to avert this situation and to work with the agency. We have never received a response to our letter, never, to this date.

These are the types of things that impact on the decisional quality and go back to the claimant ultimately.

Mr. MOODY. Mr. Enoff, do you know about that? Are you aware of this proposal?

Mr. ENOFF. I am not aware of the specific proposal Mr. Bernoski talked about. There was some peer counseling in the early 1980's that was not viewed as desirable by the association or by others. So I am very sensitive to any suggestions for peer counseling. I will be glad to look for the proposal or to receive another copy of this proposal. I will be glad to take a look at it.

Mr. MOODY. What procedure exists right now to deal with biased or incompetent ALJs? What is the review process? Mr. Stein feels there is not any.

Mr. STEIN. There is virtually none.

Mr. MOODY. Would you agree, Mr. Enoff?

Mr. ENOFF. It varies. When you build in protections, there are protections on both sides. So, if judges have some rights to protection the same as claimants do. We try to protect everyone's rights. So we are in a situation where there are allegations, the first thing that should occur would be that the supervisory judge would have a consultation with the judge who is alleged to be biased or out of line. If that does not——

Mr. MOODY. Is guaranteed that that will take place, that consultation. Whose discretion is that at?

Mr. ENOFF. I suppose it depends on which level the issue is raised. There are supervisory judges in the process who are responsible for seeing that the judges carry out their duties in accordance with the Administrative Procedure Act. If it gets to a formal stage, there are procedures, as Judge Bernoski pointed out, under the Administrative Procedure Act which we are bound to follow. The Merit Systems Protection Board gets involved in these.

I don't want to talk about specific cases because I don't think that would be proper, but we do not want to see any claimant receive anything other than fair, impartial judicial treatment. I would say the vast majority of the judges are fair, judicious, and efficient too. Basically we have good judges. In any situation where you have 700 persons in a category, occasionally there may be an indiscretion or there may be someone who does not do what is required. We have to try to deal with those under the current Merit Systems Protection Board procedures that are in place.

Mr. MOODY. Mr. Stein could you comment?

Mr. STEIN. Reading between the lines of what Mr. Enoff said is really a confession that there really are major problems and gaps in the system.

There is no formal procedure for complaining. We tried with respect to ALJ Stephens to get the area chief local judge, the chief regional judge, the Associate Commissioner for Hearings and Appeal to do something about this judge. The chief judges and OHA refused. They said you may have a serious problem but we have no power to deal with an aberrant judge. Even if the majority of these judges are competent, with an enormous number like 750, you need just 10 percent, 75 judges to be incompetent on biased and you can calculate that thousands and thousands of claimants will get a raw deal, and will be forced to have to go to Federal court for a just decision. Right now there is no procedure, indeed there is no one to complain to who has the ability to investigate.

It should not take a year's research as we did and intervention of Congressmen and Senators to get the Secretary of HHS to initiate an investigation of one ALJ who has been grossly abusive for 8 years. We are finding out in this investigation that the three Appeals Council members assigned are saying this proceeding is totally unprecedented. They have no procedures, no rules. They are going on an ad hoc basis. It is good that they are doing this inter-

nal review, even if years too late, but they are admitting in their entire history they have never done this before.

If that is the case, then there is a serious problem here. If the agency is not going to come up with some major institutional changes, I think there is no result other than for Congress to step in.

Mr. MOODY. Mr. Enoff is it true there are no formal procedures, they are flying ad hoc?

Mr. ENOFF. To say there are no procedures is not quite accurate, but this is a new area. We did appoint a three-member Appeals Council. I don't want to get into the specifics of the situation because there are people that have rights and they should be taken up in that proper forum. But yes, it is a new procedure.

I say that it is new because we have never experienced a claim like this before that has taken this route. There have been problems that have been dealt with. I am not going to give you a list of situations where complaints have been dealt with but they certainly have occurred and we have taken some action whether the complaint comes to the Commissioner, myself, the Associate Commissioner or the chief judge.

I am not, again, suggesting that it is a perfect system. But I think the system does work and there are areas that need improvement as the Commissioner states.

Mr. MOODY. Judge Bernoski, would you like to add a point before I relinquish my time?

Mr. BERNOSKI. I would say that there was testimony this morning with relationship to how the numbers are set. I think it became clear and it is also established in the GAO report that the present system of 35 or 37 cases, whatever the number is, is arrived at by the unscientific method of taking the number of cases and dividing it by the number of judges.

This is an interesting proposition because as the law has unfolded according to the *Nash* case that is probably illegal because the *Nash* case stands for the proposition that goals are acceptable but quotas are not.

It does not define a goal or a quota. But when you go to the dictionary and a quota is defined as a person's share of a body, a proportionate share. According to the GAO report that is exactly what the Social Security Administration has been doing over the years, simply setting a quota by the mathematical division which according to *Nash* is improper.

I think that states our case. That is what the Federal Court Study Commission was talking about. I think the evidence is overwhelming.

Mr. MOODY. Mr. Enoff.

Mr. ENOFF. I feel compelled to speak to the issue. If we simply divided the number of cases by the number of judges, the total would be in the forties or maybe fifties at this time. We have kept the goal at 37 because that is an achievable goal. As the Commissioner indicated, one of the reasons that we have that goal is that we need to set our budget, and we need to set our planning for staffing by some method. It is not the best, we agree. It is something that we can measure at this point in time.

Mr. MOODY. It is simply dividing one number by another?

Mr. ENOFF. Looking at the figures, 319,000 cases by 667 judges, you are not going to come up with 37. That is a goal that has been attained and exceeded in the last several years. That doesn't mean it is a right goal, but it is the goal we have to use to try to manage the resource situation. It is how we determine that claimants get some timely response to their request.

Mr. MOODY. Thank you for the extended time, Mr. Chairman.

Mr. BERNOSKI. With regard to Mr. Enoff's statement, Commissioner King in her statement on page 3 says, "In addition to the quality question only some aspects of the case processing at the hearing level can be measured objectively."

Her statement on its face admits that you cannot set up an objective standard for this particular process. When you measure that against the personnel law which says you cannot have an objective criteria, you are really skating on thin ice in this whole process.

Chairman JACOBS. Judge Bono did a very good exposition about the difficulty, I don't care whether it is in civil rights cases or in the case load of a judiciary making the distinction between a quota and affirmative action or a goal.

I heard Mr. Enoff say something that intrigued me just now. You talked about allocating resources, would you testify that the purpose of the goal is simply to determine the allocation of judges to various offices and not to determine the individual performance of the judge in a merit board hearing?

Mr. ENOFF. I would not say simply allocation of resources, there are other things, but it is not toward evaluating the particular judge's performance. We do not set goals for individual judges. As you indicated before, however, it would seem appropriate if a judge were producing one case a year that there be some counseling involved in that kind of a situation, whether it is peer or otherwise.

Goals are not used for assessing a particular judge. They are used mainly for workload and resource allocation. It goes beyond judges, and also involves support staff to the judges.

Chairman JACOBS. Counsel reminds me of the Vietnam war when the CIA referred to terminating with extreme prejudice people they did not like.

Judge Bernoski, you mentioned in your testimony some pressure to use fewer expert witnesses. Can you elucidate for the record about that?

Mr. BERNOSKI. Yes. I did not use names intentionally in my statement because I did not want them on the record. But that situation——

Chairman JACOBS. Just how it happened.

Mr. BERNOSKI. This rose in the Baltimore office where the judge there was counseled, if you will, by the hearing office chief judge regarding the number of expert witnesses, vocational experts and MA's that he was going to use on his hearing docket. We feel that the reasons for that, one of the reasons at least of course is the cost factor, it cost the Government money to have these witnesses, but also when you have hearings of this particular type they take longer because you have more witnesses and it gets right back to production, like I talked about in the beginning, it is bottomed on production.

On the other hand, most of the cases that come back from the Federal court and come back from the Appeals Council come back with the instruction that you should have expert testimony. Our position is that if you do the case right the first time, it is not going to come back and you are not going to have to redo it.

Chairman JACOBS. Huxley wrote that the soul's whip may become the body of the intruder.

You mentioned the veterans' preference, denying the minority males opportunity.

Mr. STEIN. I think it actually impacts women.

Chairman JACOBS. You did mean to imply that minority males had not served?

Mr. STEIN. No, but minority males are as virtually nonexistent as women there.

Chairman JACOBS. I suspect there is another factor. Finally your suggestion about burn out terms rather than life time limitations, would you have the same opinion with regard to article III judges?

Mr. STEIN. No, I think article III judges' life tenure has a constitutional base.

Chairman JACOBS. Would you change the Constitution in keeping with the principle?

Mr. STEIN. I don't think so. I would not tamper with that.

Chairman JACOBS. These people on the Federal judiciary, are they from a different pool of humans?

Mr. STEIN. That is a problem for Federal U.S. district court judges as well. But I think the benefits, though, of that article III constitutional independence I think probably outweigh the deficits.

Chairman JACOBS. There are some rulings beyond good behavior with respect to Federal district judges, I guess.

Mr. STEIN. There are. It has been a subject of some inquiry. I am not sure quite how well those rules work to deal with a very similar problem of burn out, incompetence and bias.

Chairman JACOBS. I see a great deal of similarity both in terms of desirability of independence and the recognition of human capacity, burn out. I think we will have to take all of that into account. I am not sure that the same principles should not be applied in any quasi or judicial situation.

Mr. STEIN. I think there is merit in what you are saying. In a somewhat related point, which makes the numbers on productivity sound like "Alice In Wonderland," it should be clear that ALJs don't generally write their own decisions. They largely abdicate their responsibility of writing and articulating the reasons why they are granting and denying benefits.

Chairman JACOBS. Isn't that true for other members of the judiciary?

Mr. STEIN. As I documented on page 4 of my testimony, where a judge inadvertently included in the opinion a note from his clerk saying, "Dear Judge Stephens, I felt it appropriate to deny this client through the grid." It revealed what is going on in the ALJ process, that you have an abdication of the role of articulating reasons, of even deciding these cases. It is being delegated to staff around them. I think there is a very, very serious problem here.

Chairman JACOBS. I know a former Senator who wrote a book he never wrote and confessed to me that he never even read it.

Mr. STEIN. That may be a problem too, but I suggest it is a lesser problem than one where an ALJ is deciding the fate of someone's future benefits.

Chairman JACOBS. Thank you very much. We will have to go to the next panel. You have all made useful contributions to the record.

Judge Sprague, I believe you are the first on the list.

STATEMENT OF HON. RICHARD F. SPRAGUE, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, CHICAGO, ILL.

Mr. SPRAGUE. Thank you very much. My name is Richard Sprague, an ALJ from the Chicago south office. I am really here in a sense on behalf of the American people, as corny as that may sound. They are getting shortchanged by what I have seen in the last 10 years. We need the protection so we can do our work properly and serve them properly the same as the police officer must be given protective devices to go out on the street and protect the public. This is not for our personal aggrandizement.

We need this to do our job properly so that the citizen either as a claimant or as a taxpayer gets what he is entitled to. They did not get it in the last 10 years. All I have seen in the last 10 years and even before is a mad chase for numbers. The agency gained a stronghold on the system through reconfiguration and the enforcement of quotas. Chief ALJs who have no tenure went wild in enforcing quotas because their motive was personal gain and greed. The same frenzy was felt by every manager from the national level all the way down to the office manager. Everything depended on the average disposition per ALJ in the office, region, or nation.

The *Grover* case which Judge Bernoski alluded to outlines the dilemma which any judge encounters in the computer age, speed and timeliness as opposed to basis fairness. That is 405 Fed. 631 at page 636. I would ask each member to be familiar with that rationale. In region 5 our production was always at the low end until a chief judge by the name of Ted Haynes was appointed. Then our averages went up dramatically. It was a game and is a game, but for high stakes because the American people as claimants and taxpayers are involved. I have written and others have written putting these managers on notice, to no effect whatsoever. The remands show the poor, defective work. We can only look to the Oak Park, Lansing, and Flint, Mich., offices. The statements of those ALJs show what was done to them. That is exhibit 5 of my statement.

The interesting factor and the thing I find amazing is that we have talked a lot about low producing judges. There has never, to my knowledge, in the history of this agency back to 1973, been a time that one high producing judge was ever counseled or even questioned about how he worked the magic and produced all the numbers when on the face they are, of course, more than suspect. Why not?

To start with, the numbers are suspect because of coercion and threats. Some chase the numbers. In other words, if a judge does a quick uninformed decision, that is the same as no decision. Well, a lot of those numbers went into the average monthly disposition.

Since that was not enough to increase the numbers, they engaged in padding schemes.

This involved Medicare part A cases. I am not a defender of HCFA although I will point this out and it is important, most of the HCFA cases that I have seen waived the expenses to the individual beneficiary or patient. They are not involved with most of these hearings. It is just the hospitals nursing homes, and the health care providers. So the American people are not being shortchanged in that regard. I am not a defender of HCFA or the State agencies. But I will say this: even HCFA and the lower levels are entitled to a fair look at their case. I believe when Chief Haynes took over the Chicago West office in December 1986, he grabbed a number of Medicare cases from Evanston.

Ken Paulini who has been mentioned here told me he didn't know how he would increase production in that office because that office was not a high producer. He said Haynes had paid a filing cabinet full of these cases. I said how do you know no one looked at them and he said because the exhibits had not been pulled. He later went on to explain how this was done. Mr. Horn from the same office said Haynes told him he had cases that could be paid on the record. He then told the attorney advisers to prepare draft decisions for ALJs to approve.

Then he apportioned seven or eight to each ALJ in the office. They could have disapproved. That is true. I asked Paulini in one of our conversations whether the ALJs had ever sent back any of these cases. He laughed as if to say, are you kidding? My impression was that it was like tempting a hungry man with a T-bone steak. Horn did approve some but he sent some back. Ted Haynes again grabbed a bunch of Medicare cases from the Evanston office in 1988 as chief judge. In the first 9 months of 1989 he paid 469 of those cases on the record, more than I have paid in the last 17 years.

The instructions given to the attorney advisers, "Looks unusual". The grabbing of the Bodimetric cases in 1987 and the other cases in 1989 and quickly disposing of them on the record as Judge Horn said to me when he was talking about the new system, smells. Then to put icing on the cake to inflate the various offices in the region, he disposed of a total of 661 dispositions during that time which is 73 a month on an average.

He gave them to the various offices in the region to inflate their numbers and give a false average disposition in that office which then gave a false misleading average in the region because he was not counted. This was part of the "Hide a Judge" scheme, just count the dispositions, but not the judge who did the work. It was done with retired judges, chief ALJ and part B Medicare judges. This grossly miscalculated the figures for the office and the Nation.

The bureaucrats lived off these numbers, getting promotions, awards, appraisals, and freedom from harassment. They were not bothered by any of that. They got the goodies. I cited the Chicago downtown office as an example on page 7 of my statement.

At least 5 of the months in 1989 were grossly inflated because of Chief Haynes Medicare cases or retired judges disposition. I have tried to get an investigation on this. I have not gotten no where

with GAO or the IG. I may try the FBI. If they will get the numbers nationally, I will do the arithmetic for them.

Chairman JACOBS. Judge Sprague I have before me some of the questions propounded to me that I relayed to GAO. After this vote, I may ask one of our staff people to read those into the record.

As far as I can tell so far there is only one question that does not have an answer.

Mr. SPRAGUE. OK. I have been since November or before trying to get someone to look into it. It seems to be a national scheme to hide a judge and hide the dispositions for greed and personal gain. ALJs need more protections, not for their own self aggrandizement, but so they can do their jobs. That is unimportant to me. I have less than 3 years until I can retire so any benefits won't affect me.

Chairman JACOBS. You have also taken more than your fair share of time.

Thank you.

Mr. SPRAGUE. Thank you.

[The prepared statement follows:]

200 W. ADAMS ST.#510
CHICAGO IL 60606
JUNE 1990

HON. ANDREW JACOBS, JR., M.C.
CHAIRMAN,SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U. S. HOUSE OF REPRESENTATIVES
WASHINGTON DC

DEAR MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY. I APPEAR IN MY PERSONAL CAPACITY AND DO NOT REPRESENT THE SOCIAL SECURITY ADMINISTRATION OR ANYONE ELSE.

MY NAME IS RICHARD F. SPRAGUE. I HAVE BEEN AN ADMINISTRATIVE LAW JUDGE (ALJ) WITH THE SOCIAL SECURITY ADMINISTRATION (SSA) OFFICE OF HEARINGS AND APPEALS (OHA) FOR OVER 17 YEARS. I HEAR AND DECIDE (DE NOVO) APPEALS INVOLVING SOCIAL SECURITY, MEDICARE, AND OTHER RELATED MATTERS. MYSELF AND MORE THAN 600 OTHER ALJS PARTICIPATED IN THE STUDY THAT LED TO THE GENERAL ACCOUNTING OFFICE (GAO) REPORT OF DECEMBER 1989 ENTITLED "MANY ADMINISTRATIVE LAW JUDGES OPPOSE PRODUCTIVITY INITIATIVES". THE ISSUES AND CONTROVERSY BETWEEN THE ALJS AND THE AGENCY ARE NOW WELL KNOWN AND JOINED.

I.
A.
ABUSES: UNQUENCHABLE APPETITE FOR PRODUCTION NUMBERS

THIS COMMITTEE HAS BEEN WELL INFORMED ABOUT THESE DOCUMENTED ABUSES, ESPECIALLY IN THE LAST 10 YEARS DURING THE REAGAN ADMINISTRATION. A NUMBER OF LAWSUITS HAVE BEEN FILED AGAINST THE AGENCY BY THE ALJS WITH LITTLE OR NO RELIEF GRANTED. THE ONLY RESULT HAS BEEN TO CAUSE THE AGENCY TO PULL BACK, REGROUP, AND LATER HIT THE HEARING PROCESS WITH OLD AND NEW ABUSES WORSE THAN BEFORE.

THAT'S WHAT HAPPENED WHEN SSA COMMISSIONER DORCAS HARDY AND OHA ASSOCIATE COMMISSIONER EILEEN BRADLY TOOK OVER IN 1986 WITH THE AID OF LOU ENOFF, CHIEF ALJ TED HAYNES AND OTHERS. THEY WERE ORDERED BY THE WHITE HOUSE TO CUT COSTS AND DO THE JOB, OR PRETEND TO DO IT, WITH LESS PEOPLE. THE WAY THEY WENT ABOUT CARRYING OUT THIS MANDATE IN OHA WAS DISGRACEFUL, AND IN THE MODE OF THE OLDEST PROFESSION KNOWN TO MAN. THEY PUT TREMENDOUS PRESSURE ON THE STAFF AND ALJS TO DISPOSE OF CASES. THEIR MOTIVES WERE GREED. THEIR CAREERS, APPRAISALS, AWARDS AND BONUSES DEPENDED ON THE DISPOSITION OF CASES. AS THE NUMBERS INCREASED SO DID THEIR WORTH TO THE AGENCY. WORDS LIKE QUALITY, DUE PROCESS, & FAIRNESS WERE WHISPERED (THEY TOOK TOO MUCH TIME) AND NUMBERS WERE SHOUTED. THE HALLMARK OF THE AGENCY WAS TO "DO MUCH MORE WITH LESS" REGARDLESS OF WHO SUFFERED.

THE AGENCY GAINED A STRANGLEHOLD ON THE ALJS AND THE HEARING PROCESS BY RECONFIGURATION WHERE CONTROL OVER THE ALJS' STAFF WAS PLACED IN THE HANDS OF AGENCY MANAGERS. THE STAFF WAS GRADED SOLELY ON NUMBERS. QUOTAS WERE RIGIDLY ENFORCED. THE QUALITY OF WORK TOOK A NOSEDIVE. WHEN YOU CONTROL A JUDGE'S STAFF, YOU CONTROL HIM. OR AT LEAST YOU CAN MAKE HIS LIFE MISERABLE IF HE CARES ABOUT HIS WORK.

LARGE AMOUNTS OF POOR WORK WAS REWARDED WITH BONUSES, ETC. AND A REASONABLE AMOUNT OF GOOD WORK WAS RIDICULED.

OUR SO-CALLED CHIEF ALJS (WHO HAVE NO TENURE) COOPERATED FULLY IN THIS PUSH FOR NUMBEPS AT ALL COST. THEIR MOTIVE WAS SIMPLE, A PROMOTION TO A HIGHER GRADE. IT ALL DEPENDED ON AN INCREASE IN THE "AVERAGE MONTHLY DISPOSTIONS OF THE ALJS" IN THEIR OFFICES, REGIONS, AND COUNTRY. EVERY MANAGER AND CHIEF GAINED BY THIS. IT DIDN"T MATTER THAT THE HEARING PROCESS, THE CLAIMANTS,AND THE TRUST FUND WERE DEVASTATED BY THE BAD WORK. (COURT REMANDS SHOWED THIS.) THE NUMBERS DID SOAR AND THEY GOT PAID OFF BY PROMOTIONS ETC. WHAT IS MORE DISGUSTING IS THAT WHEN ALL THE DAMAGE SINCE 1986 &BEFORE BECAME WELL KNOWN, MS. BRADLEY THEN SUDDENLY IN 1/90 ADMITTED THAT SHE HAD FALLEN INTO A TRAP AND WAS WRONG IN ENFORCING QUOTAS. SHE PLAYED DUMB. (EXHIBIT 1)

THE CHIEF ALJS WERE RUTHLESS IN ILLEGALLY ENFORCING QUOTAS ON ALJS. (A SHORTHAND DISTINCTION BETWEEN A GOAL AND QUOTA IS A GOAL IS WHERE THE BOSS SAYS HE WOULD LIKE YOU TO TRY AIM FOR THE TARGET: IN A QUOTA YOU BETTER DO IT OR ELSE.) THE CHIEFS USED EVERY IMAGINABLE TACTIC FROM COERCION, DENIAL OF LEAVE REQUESTS AND TRANSFERS, THREATS TO CLOSE OFFICES, STRIPPING OF STAFF, PUTTING ALJS ON TRAVEL STATUS, CANCELLING DOCKETS, ORDERING ALJS TO SET A CERTAIN NUMBER OF CASES, VIOLATING THE APA'S PROVISION CALLING FOR CASES TO BE ASSIGNED IN ROTATION AS PRACTICABLE IN ORDER TO INFLATE DISPOSITIONS: USING FOUL AND VILE LANGUAGE TO INTIMIDATE, CONSTANTLY ISSUING CONGRATULATORY LETTERS TO ENFORCE QUOTAS, AND THE CONSTANT PUBLISHING OF DISPOSITIONS TO GET EVERYONE TO CHASE THE NUMBERS. GROUP EXHIBIT 2 OUTLINES THESE ABUSES AND THE REPLIES. THIS PAID OFF FOR THE CHIEFS SINCE THEY WERE ALL PROMOTED IN 5/89. (EXHIBIT 3).

REGION V, MY REGION, HAD ONE OF THE MOST RUTHLESS ENFORCERS OF QUOTAS IN THE U.S. HE WAS TED HAYNES. HE WAS FEARLESS. NEITHER LAW, GOOD MANNERS, OR COMMON DECENCY WOULD STOP HIM FROM INCREASING PRODUCTION. HIS POWER AND RUTHLESSNESS ROSE IN DIRECT PROPORTION TO ONE ANOTHER. A REVIEW OF HIS DRAMATIC RISE IS AS FOLLOWS: HE WAS PROMOTED TO CHIEF (HOCALJ) OF THE CHICAGO (WEST) OFFICE IN 12/86; REGIONAL CHIEF OF REGION V IN 2/88. (HE IMMEDIATELY THREW HIS WEIGHT AROUND THE OAK PARK, MI OFFICE.) IN 5/89, PROMOTED TO A GRADE 16. RESIGNED AS CHIEF IN REGION V IN 10/89 OSTENSIBLY TO BE A REGULAR ALJ IN BALTIMORE,MD. I SAY "OSTENSIBLY"BECAUSE HE WAS PROMOTED TO NATIONAL CHIEF ALJ ON 1/19/90. (GROUP EXHIBIT 4).

HAYNES PARADED HIS BOGUS NUMBERS AROUND LIKE "MEDALS OF HONOR". WHAT HE DID, OR ATTEMPTED TO DO, IN THE HEARING OFFICES OF OAK PARK MI, FLINT MI & LANSING MI WAS A NATIONAL DISGRACE. (SEE STATEMENTS FROM THESE ALJ. NEITHER MS. HARDY, MS. BRADLEY, MR. ENOFF, OR OTHERS DID ANYTHING TO STOP HIM. THEY WERE GLAD TO GET HIS NUMBERS TO ADVANCE THEIR OWN CAREERS & GET BONUSES (EXHIBIT 5).

HAYNES WAS QUITE CANDID TO OUR OFFICE IN HIS CONGRATULATORY LETTER OF 5/5/88 SHOWING HOW VERY IMPORTANT THESE NAKED NUMBERS WERE. HE SAID IN PART: "...PERFORMANCES SUCH AS YOURS INSURE THAT MY QUEST FOR ADEQUATE STAFF, SPACE AND EQUIPMENT FOR OUR REGION WILL BE MADE INFINITELY EASIER." WE RESPONDED INCISIVELY TO HIS INSULTING AND EMPTY AWARD (EXHIBIT 6). ON 3/28/89, HE HEARTILY APPLAUDED OUR REGION ON ITS NAKED NUMBERS BY SHOUTING "WE'RE NUMBER FOUR" AS IF AT A SPORTING

MATCH (EXHIBIT 7). MS. BRADLEY WAS NOT TO BE OUTDONE. SHE SENT OUT HUNDREDS OF THESE PHONY CONGRATULATORY LETTERS TO OFFICES IN EVERY REGION (EXHIBIT 8). HARDY, BRADLEY, ENOFF, ET AL. KNEW, OR SHOULD HAVE KNOWN, THAT SOME OF THESE NUMBERS WERE BOGUS SINCE THEY WERE BASED ON QUICK, SLOPPY, AND UNCARING WORK. YET, THEY ALLOWED THIS UNPROFESSIONAL WORK TO CONTINUE FOR CAREER PURPOSES. THE PROOF OF THIS IS IN THE REMANDS, AND THAT THEY NEVER ONCE CAUTIONED EVEN ONE ALJ WHOSE HIGH NUMBERS ALONE SHOULD HAVE CAUSED GRAVE SUSPICION OF HOW HE WAS HANDLING HIS CASES. INSTEAD, THEY BASKED IN THE GLORY OF THE HIGH DISPOSITIONS. (SEE GROUP EXHIBIT 2 PUTTING THEM ON NOTICE OF THE ABUSES, AND EXHIBIT 9 DATED IN 11/89 REQUESTING AN I.G. INVESTIGATION OF HAYNES.) IN A FAIR HEARING PROCESS WHERE SOME DISPOSITIONS ARE CAUSED BY THREATS AND COERCION, THEY ARE NOT ONLY SUSPECT, BUT BOGUS. IT SEEMS OBVIOUS THAT SOME ALJS SHORT CIRCUITED THEIR PRE-TRIAL, HEARING, POST TRIAL, AND DECISIONAL DUTIES BECAUSE OF THESE THREATS, ETC. (ALJ GIL DRUCKER WROTE AN EXCELLENT PAPER ON THE DUTIES OF ALJS AND WILL TESTIFY BEFORE THIS COMMITTEE).

B.

DUMPING SYNDROME

THE LOWER LEVEL STATE AGENCIES WHO MAKE INITIAL AND RECONSIDERATION DETERMINATIONS IN SSA DISABILITY CLAIMS ALSO FELT THE IMPACT OF THE REAGAN COSTCUTTING PRETENSES OF BEING ABLE TO DO AS MUCH OR MORE WITH LESS. DUE TO THE LACK OF FUNDS AND NECESSARY EMPLOYEES, THE STATE AGENCIES DIDN'T HAVE THE TIME TO MAKE CAREFUL DETERMINATIONS.SO THEY JUST DENIED THEBULK OF THE CLAIMS AND DUMPED THEM ONTO THE SHOULDERS OF THE ALJS FOR HEARINGS ON THE APPEALS. THIS CREATED AN ARTIFICIAL, BUT REAL BACKLOG IN OHA. I SAY "ARTIFICIAL" BECAUSE SOME OF THESE CASES WOULD HAVE BEEN PAID AT THE LOWER LEVELS IF THEY HAD ENOUGH RESOURCES TO HANDLE THEM PROPERLY.

C.

ATTEMPT TO LOWER ALJS' QUALIFICATIONS

THE AGENCY AND CHIEF HAYNES ARE TRYING TO GET OPM TO LOWER THE QUALIFICATIONS SO THEY CAN HIRE AGENCY ATTORNEYS FOR "CONTROL" PURPOSES. THIS METHOD CALLED "INBREEDING" HAS BEEN DISCREDITED AND DISCONTINUED SINCE THE APA WAS ENACTED. THE AGENCY'S CONCERN FOR MINORITIES AND WOMEN SEEMS TO BE A DIVERSION. THERE ALSO HAVE BEEN MANY RUMORS THAT THE AGENCY MAY HAVE "PLAYED AROUND" WITH THE PRESENT LIST OF APPLICANTS FOR ALJ POSITIONS IN ORDER TO HIRE AGENCY ATTORNEYS WHO WERE LOWER ON THE LIST.THIS WHOLE MATTER SHOULD BE WATCHED CAREFULLY BY THIS COMMITTEE AND INVESTIGATED.

II

PRODUCTION PADDING SCHEMES

SOME MANAGERS WERE NOT CONTENT WITH JUST INFLATING THE DISPOSITIONS BY THREATS, COERCION ETC. IN ADDITION TO THIS, PRODUCTION PADDING SCHEMES WERE HATCHED. IT INCLUDED THE IMPROPER HANDLING OF MEDICARE PART "A" CASES (HIA) AND THE USE OF RETIRED ALJS AND OTHER ALJS TO INFLATE THE "AVERAGE MONTHLY DISPOSITIONS OF THE ALJS". REMEMBER, EVERY BENEFIT TO THE MANAGERS HINGED ON INCREASING THE "AVERAGE MONTHLY DISPOSITIONS OF THE ALJS." THEY COULD ONLY DO THIS BY PRETENDING TO DO "MORE WITH LESS". (SEE: EXHIBIT 10, 5/90 REQUEST FOR I.G. INVESTIGATION).

A BRIEF HISTORY MUST BE STATED IN ORDER TO PUT THE SCHEMES INTO PROPER PERSPECTIVE. THE HEALTH CARE FINANCING ADMINISTRATION (HCFA) IS UNDER THE SECRETARY OF HEALTH & HUMAN SERVICES (HHS). HCFA IS RESPONSIBLE FOR DEVELOPING AND DETERMINING THE VALIDITY OF ALL MEDICARE CLAIMS. SINCE HHS DOES NOT HAVE ITS OWN ALJS, THEY HAVE USED THE SERVICES OF THE SSA ALJS TO HEAR AND DECIDE THESE CASES ON APPEAL. HCFA THEN DECIDED TO SET UP ITS OWN CORPS OF ALJS BASED IN WASHINGTON UNDER THE CONTROL OF LOU HAYS (HAYS WAS CASTIGATED WHEN HE WAS SUED BY OUR ASSOCIATION FOR ENFORCING QUOTAS AND HARASSING HIGH-PAYING ALJS. HE RESIGNED UNDER FIRE.) HCFA WAS TRYING TO GET CLAIMANTS AND PROVIDERS TO WAIVE THEIR RIGHT TO A FORMAL HEARING. HCFA WANTED THEM TO AGREE TO HAVE THEIR HEARINGS OVER THE TELEPHONE BEFORE THESE NON-APA ALJS. HCFA WENT TO CONGRESS FOR FUNDS TO SUPPORT THIS CONCEPT, KNOWN AS "DIAL A JUDGE". THIS BROUGHT STORMS OF PROTEST. CONGRESS WASHED ITS HANDS OF IT. (LATER, IT WILL BE SHOWN THAT SSA-OHA WENT TO A "HIDE A JUDGE" SCHEME).

THE QUESTION REMAINED, WHO WOULD HEAR THESE MEDICARE APPEALS. MS. BRADLEY ON BEHALF OF SSA-OHA CALLED A MORATORIUM ON THE HANDLING OF THESE MEDICARE APPEALS BY THE ALJS. IT LASTED SEVERAL MONTHS. THE CASES STARTED TO PILE UP. THIS WAS ESPECIALLY NOTED IN THE EVANSTON HEARING OFFICE IN REGION V, AND PROBABLY ELSEWHERE. THE MORATORIUM WAS THEN RELEASED. IN THE FALL OF 1988, THE EVANSTON OFFICE HAD OVER 700 OF THESE MEDICARE CASES. SOMETHING HAD TO BE DONE. HAYNES AND OTHERS KNEW HOW TO HANDLE THIS PROBLEM.

A.

THE MEDICARE PADDING SCHEME: REGION V

CHIEF HAYNES IN 12/86 KNEW THE ADVANTAGES OF QUICKLY DISPOSING OF THESE MEDICARE CASES ON THE RECORD.

(1) WHEN HAYNES TOOK OVER IN 12/86 AS CHIEF OF THE CHICAGO (WEST) HEARING OFFICE, HE KNEW THAT THE EVANSTON OFFICE HAD HUNDREDS OF MEDICARE CASES INVOLVING A PROVIDER CALLED BODIMETRIC. HAYNES WORKED A DEAL WITH REGIONAL AND/OR NATIONAL HEADQUARTERS TO HAVE THE BODIMETRIC CASES TRANSFERRED TO HIM. HE PROBABLY CONVINCED THEM THAT HE WOULD DISPOSE OF THEM QUICKLY AND PUT A LOT OF NUMBERS FOR THEM ON THE SCOREBOARD. IT WAS A GREAT DEAL FOR EVERYONE. THE BODIMETRIC CASES WERE TRANSFERRED TO HIM AND THE NUMBERS SOARED AT CHICAGO (WEST).

(2) WHEN HE TOOK OVER CHICAGO (WEST) HE PAID MANY OF THESE MEDICARE CASES ON THE RECORD WITHOUT A HEARING. KEN PAULINI, AN ATTORNEY-ADVISOR FROM THAT OFFICE, SAID HE WONDERED HOW HAYNES WAS GOING TO INCREAS E DISPOSITIONS WHEN HE TOOK OVER. PAULINI SAID IT DIDN'T TAKE LONG TO FIND OUT. HE SAID THAT HAYNES PAID A FILING CABINET FULL OF MEDICARE CASES ON THE RECORD. HE SAID THAT NO ONE HAD EVEN REVIEWED THEM BECAUSE THE EXHIBITS HADN'T EVEN BEEN PULLED. IT WAS THE TALK OF THE OFFICE.

(3) ALJ JAMES HORN WAS ASSIGNED TO THE CHICAGO (WEST) OFFICE WHEN TED HAYNES TOOK OVER. HE CORROBORATED PAULINI'S STATEMENTS. HIS IMPRESSION WAS THAT HAYNES' PLAN WAS TO TRY TO PAY AS MANY OF THESE CASES AS POSSIBLE ON THE RECORD FOR QUICK DISPOSITIONS. HORN DIDN'T LIKE IT AND THOUGHT SOMETHING SMELLED. HE SAID YOU JUST COULD NOT

PAY THEM ON THE RECORD LIKE THAT. HE DID HANDLE ABOUT 8 OR 9 OF THE BODIMETRIC CASES. HE AGREED THAT 4 OR 5 COULD BE PAID ON THE RECORD. HE SENT 4 BACK. HE FELT THAT 3 COULD NOT BE PAID ON THE RECORD. HE NEVER RECEIVED ANOTHER BODIMETRIC CASE PRESUMABLY BECAUSE HE WOULD NOT GO ALONG WITH THE PLAN. HAYNES' DISPOSITIONS WENT UP BY PAYING THESE CASES. HORN MADE A NOTATION ON THE MONTHLY OFFICE FIGURES' STATEMENT OF 3/87 SAYING "ALL NUMBERS GREATLY INFLATED DUE TO BODIMETRIC CASES." (EXHIBIT 11) HORN SAID THAT HAYNES TOLD HIM AND OTHERS NOT TO WORRY ABOUT HIS HIGH DISPOSITIONS BECAUSE HE WAS HANDLING MEDICARE CASES. HORN TALKED WITH PAULINI AND OTHERS ABOUT THE MESS IN THE OFFICE CONCERNING THE HANDLING OF THE MEDICARE CASES IN SUCH A FASHION.

(4) ALJ GIL DRUCKER WAS ASSIGNED TO THE CHICAGO (DT) HEARING OFFICE DURING HAYNES' TENURE. HE WAS SUSPICIOUS OF HAYNES' MEDICARE DISPOSITIONS GIVEN CREDIT TO HIS OFFICE. HE FELT THAT HAYNES ASSIGNED HIMSELF TO DRUCKER'S OFFICE, ON PAPER, TO INCREASE THAT OFFICE'S DISPOSITIONS. THEY WERE ALL COOk-DUPAGE MEDICARE CASES FROM THE EVANSTON OFFICE WHICH HE REASSIGNED TO HIMSELF. HAYNES NEVER DID ANY OF THE WORK THERE. THEY WERE ALL PAID ON THE RECORD WITHOUT A HEARING. HAYNES DIDN'T SIGN MOST OF THESE DECISIONS. ALL THE INSTRUCTIONS WERE GIVEN BY ATTORNEY-ADVISOR MITCHELL SANDLER (ON BEHALF OF HAYNES) TO THE WRITERS. (PENNY GILLEN, SUPERVISING ATTORNEY-ADVISOR FROM THAT OFFICE, WILL CORROBORATE DRUCKER). THE CHICAGO (DT) OFFICE GOT CREDIT FOR 165 OF HAYNES' DISPOSITIONS. THE OFFICE GOT 55 in 2/89, 42 in 3/89, 43 in 4/89, AND 25 in 5/89.

(5) ALJ Jim Drzwiecki of the Evanston OFFICE SAID THAT IT WAS COMMON KNOWLEDGE THAT HAYNES WAS ASKING THEN-HOCALJ NICCHITTA FOR MEDICARE CASES. HAYNES TOOK DOCKETS OF MEDICARE CASES ALREADY SET FOR HEARING IN 10/89 AWAY FROM HIM AND OTHER ALJS. THE ONLY THING THEY COULD THINK OF FOR THIS ACTION WAS THAT HAYNES WANTED THEM DISPOSED OF FOR THE MONTH OF SEPTEMBER WHICH IS A KEY MONTH. ALJ NICCHITTA SAID THAT HAYNES, THROUGH THE REGIONAL OFFICE, HAD HUNDREDS OF BODIMETRIC CASES TRANSFERRED TO HIM WHEN HE WAS HOCALJ OF CHICAGO (WEST). LATER, HAYNES A S CHIEF OF THE REGION ORDERED NICCHITTA TO TRANSFER HUNDREDS OF COOK DU PAGE MEDICARE CASES TO HIM. ALJ AL JONAS, AND FORMER MANAGER OF THE OFFICE. MARA LYN ROBERTS WILL CORROBORATE THIS (EXHIBIT 20).

(6) ALJ ADRIAN SANNIER WAS AND IS ASSIGNED TO THE LANSING MI HEARING OFFICE. HAYNES GAVE 19 OF HIS MEDICARE ON-THE-RECORD DISPOSITIONS TO THE LANSING OFFICE. DISPOSITIONS OF MULTIPLE PERIOD CASES OF THE 19 WERE CREDITED TO 5 OTHER OFFICES IN THE REGION. THESE DISPOSITIONS HAD NO CONNECTION WITH THE LANSING OR OTHER OFFICES. THEY WERE ALL COOK-DUPAGE MEDICARE CASES FROM EVANSTON. HAYNES HELD NO HEARINGS AND DIDN'T EVEN SIGN THEM. THEY CONTAINED THE SAME FORM INSTRUCTIONS FROM MITCHELL SANDLER THAT JUDGE DRUCKER AND I HAD FOUND IN OUR OFFICE (GROUP EXHIBIT 12)

(7) ALJ STAN GILL WAS AND IS ASSIGNED TO THE COLUMBUS OH HEARING OFFICE. HE SAID THAT HAYNES, WHILE REGIONAL CHIEF, TOOK OVER HIS OFFICE AS HOCALJ. HE IMMEDIATELY REASSIGNED 28 MEDICARE CASES FROM THAT OFFICE TO HIMSELF.

(8) I AM AN ALJ ASSIGNED TO THE CHICAGO (S) HEARING OFFICE. MY OFFICE RECEIVED 30 MEDICARE DISPOSITIONS TO BE DRAFTED BY OUR ATTORNEY ADVISORS. THESE CASES SUDDENLY TURNED INTO 55 DISPOSITIONS DUE TO MULTIPLE PERIODS AND REQUESTS FOR HEARINGS INVOLVED. I DON'T

KNOW WHAT OFFICE(S) GOT CREDIT FOR THEM. THESE WERE ALL COOK DU PAGE DISPOSITIONS PAID ON THE RECORD. THEY HAD THE SAME ATTACHED FORM INSTRUCTIONS ISSUED BY MITCHELL SANDLER THAT ALJS DRUCKER AND SANNIER HAD DISCOVERED IN THEIR OFFICES (EXHIBIT 13).

THE LANSING ALJS MADE A REQUEST FOR HAYNES'DISPOSITIONS FOR 1989 AND OTHER MATERIAL UNDER THE FREEDOM OF INFORMATION ACT. SSA-OHA DELAYED GIVING THEM THAT MATERIAL WITHIN THE LEGAL TIME LIMITS. THEY DRAGGED THEIR FEET. IT WASN'T UNTIL THE LANSING ALJS THREATENED A LAWSUIT THAT SOME OF THE MATERIAL WAS FINALLY TURNED OVER. THE NUMBERS WERE SHOCKING! THEY SHOW WHY SSA-OHA WAS RELUCTANT. THE RECORDS SHOW THAT FOR THE FIRST NINE MONTHS OF 1989 HE DISPOSED OF 661 CASES. OF THESE DISPOSITIONS, 469 WERE PAID ON THE RECORD WITHOUT A HEARING. THE 469 WERRE PROBABLY COOK DUPAGE CASES FROM EVANSTON. FOR THE 9 MONTHS in 1989, THIS COMES TO AN AVERAGE OF 73 CASES A MONTH (GROUP EXHIBIT 14).

THESE FACTS SEEM TO INDICATE THAT HAYNES GAVE LITTLE PERSONAL ATTENTION TO THESE MEDICARE CASES. HE DELEGATED THESE DUTIES TO ATTORNEY ADVISORS. HE LEARNED IN 1987 WHEN HE RECEIVED THE FIRST BATCH OF BODIMETRIC CASES FROM EVANSTON HOW EASY IT WAS TO GET NUMBERS BY PAYING THEM. IN 1988-89, HE SAW ANOTHER GREAT OPPORTUNITY IN THE SECOND BATCH OF COOK DUPAGE MEDICARE CASES FROM EVANSTON. AS CHIEF, HE IMMEDIATELY GRABBED THEM. IT WAS UNUSUAL ABOUT THE WAY HE HANDLED THE BODIMETRIC CASES IN 1987. THE COOK DUPAGE CASES SEEM TO HAVE BEEN HANDLED IN THE SAME WAY IN 1989.

IN 9 MONTHS IN 1989, HE DISPOSED OF AND PAID 469 CASES ON THE RECORD. (I HAVE BEEN AN ALJ FOR 17 YEARS AND I DON'T BELIEVE THAT I HAVE DISPOSED OF AND PAID 469 CASES ON THE RECORD).

THE FACT THAT HE DIDN'T SIGN MANY OF THEM IS HIGHLY UNUSUAL. THE MASS DELEGATION OF THESE DUTIES IS HIGHLY UNUSUAL. THE DISPOSING OF 469 CASES IN 9 MONTHS ON THE RECORD IS HIGHLY UNUSUAL. IN MY OFFICE, AND OTHER OFFICES, THE ALJS USUALLY HEAR MOST OF THESE MEDICARE CASES WITH THE HELP OF MEDICAL ADVISORS, SINCE THEY USUALLY INVOLVE MEDICAL DISCRETION AND OPINIONS. IT SEEMS THAT THE PROVISIONS OF TITLE 5 (ADMINISTRATIVE PROCEDURE ACT, "APA") WHICH CALLS FOR THE ASSIGNMENT OF CASES TO ALJS ON A ROTATIONAL BASIS AS PRACTICABLE WAS COMPLETELY DISREGARDED. CERTAINLY, THE ASSIGNMENT OF HUNDREDS OF MEDICARE CASES IN 1987, AND HUNDREDS MORE IN 1988-89, WHICH WERE QUICKLY PAID ON THE RECORD IS GROSSLY UNUSUAL. HAYNES' 661 DISPOSITIONS IN 1989 CREDITED TO OTHER OFFICES, WITHOUT HIM BEING COUNTED, FITS INTO THE SAME PATTERN.

IT COULD ALSO BE REASONABLY ARGUED THAT ALL CHIEF ALJS SHOULD BE DISQUALIFIED FROM HEARING ANY CASE BECAUSE THEY ARE REALLY AGENCY MANAGERS UNDER THE COMPLETE CONTROL OF THE AGENCY.

B.

THE "HIDE A JUDGE" SCHEME

THIS IS A SIMPLE METHOD BY WHICH SOME MANAGERS IN SSA-OHA USED TO INFLATE THE "AVERAGE MONTHLY DISPOSITIONS." YOU JUST COUNT THE DISPOSITIONS OF CERTAIN ALJS, BUT NOT THE ALJS. THIS WAS DONE ON A WIDESPREAD BASIS IN REGION V AND PROBABLY IN OTHER REGIONS. THIS WAS

DONE BY USING RETIRED ALJS TO HEAR AND DISPOSE OF CASES. THE RETIRED ALJS' DISPOSITIONS WOULD BE CREDITED TO THE OFFICE, BUT THEY WOULD NOT BE COUNTED. IN OTHER WORDS, IF THERE WERE 5 PERMANENT ALJS ASSIGNED TO THE OFFICE, AND 2 RETIRED ALJS DISPOSED OF CASES IN A GIVEN MONTH, ALL 7 ALJS' DISPOSITIONS WOULD BE CREDITED TO THE OFFICE, BUT ONLY 5 OF THEM WOULD BE GIVEN CREDIT FOR ALL OF THE DISPOSITIONS. (5 WOULD BE DIVIDED INTO THE TOTAL DISPOSITIONS AND NOT THE 7 PRODUCING THEM.) THIS WOULD INFLATE THE "AVERAGE MONTHLY DISPOSITIONS PER ALJ" FOR THAT MONTH.

ALSO, HAYNES' 661 DISPOSITIONS IN 1989 WERE CREDITED TO OTHER OFFICES IN THE REGION TO FALSELY BUILD UP THEIR NUMBERS. BUT HE WAS HIDDEN AND NOT COUNTED AS PRODUCING THEM. THIS INFLATED THE NUMBERS FOR THOSE OFFICES AND THE REGIONAL AVERAGE PER ALJ.

FURTHER, AN ALJ IN THE CHICAGO (W) OFFICE IS PRESENTLY DISPOSING OF PART "B" MEDICARE CASES. REGIONAL OFFICE IS CURRENTLY COUNTING HIS DISPOSITIONS BUT NOT HIM. SSA-OHA IS ALSO ILLEGALLY SETTING UP A SPECIAL CORPS OF ALJS TO HEAR PART "B" MEDICARE CASES ON THE GROUND THAT IT DOESN'T HAVE THE MONEY TO TRAIN ALL OF THE ALJS. THIS IS BOGUS SINCE INSTRUCTIONS COULD BE GIVEN TO ONE ALJ IN AN OFFICE WHO COULD THEN INSTRUCT THE OTHER ALJS IN HIS OFFICE OR IT COULD BE DONE BY WRITTEN INSTRUCTIONS. BUT REGARDLESS, THIS VIOLATES THE APA PROVISION OF ASSIGNING CASES IN ROTATION. IF THIS CORPS WANTS TO CONTINUE HEARING THESE CASES, IT MUST FOLLOW THE DIRECTIONS OF THE AGENCY, OR ELSE. IT IS A CORPS WITHIN A CORPS.

IN REGION V, THE "HIDE A JUDGE" SCHEME WORKED THIS WAY:

(1) ALJ GIL DRUCKER (CHICAGO-DT OFFICE) WILL TESTIFY BEFORE THIS COMMITTEE AND STATE THAT HIS OFFICE GOT CREDIT FOR 165 OF HAYNES' DISPOSITIONS IN 1989. THERE WERE 9 PERMANENT ALJS ASSIGNED TO THE OFFICE FOR 1989. WITH HAYNES COUNTED, THERE WERE 10 ALJS DISPOSING OF CASES FROM 2/89 to 5/89. THE REGIONAL FIGURES SHOWED THAT THE AVERAGE DISPOSITIONS PER ALJ WERE 33 IN 2/89, 47 in 3/89, 33 in 4/89, and 36 in 5/89. IF HAYNES HAD BEEN COUNTED (AS HE SHOULD HAVE BEEN) AS THE 10th ALJ,THE ACTUAL AVERAGES WOULD HAVE BEEN 28.6 in 2/89, 40.4 in 3/89, 28.9 in 4/89, and 31.7 in 5/89.

AT LEAST 2 RETIRED ALJS HEARD CASES IN 1989 FOR THE CHICAGO(DT) OFFICE. THEIR DISPOSITIONS WERE COUNTED, BUT NOT THEY. THE REGIONAL FIGURES SHOWED THE AVERAGE DISPOSITIONS PER ALJ WAS 37 in 11/89. WHEREAS, IF THE RETIRED ALJS WERE COUNTED THE TRUE AVERAGE DISPOSITIONS FOR THE 11/89 WOULD HAVE BEEN ONLY 30.3. THESE WERE & ARE GROSS DISTORTIONS.

(2) THE SAME THING HAPPENED AT THE EVANSTON OFFICE IN 1989. RETIRED ALJS'DISPOSITIONS WERE CREDITED TO THE OFFICE, BUT TH EY WERE NOT COUNTED. THIS FALSELY INFLATED THE OFFICE'S AVERAGE MONTHLY DISPOSITIONS PER ALJ FOR THOSE MONTHS.

ALJS DRZWIECKI, JONAS, NICCHITTA, AND FORMER MANAGER MS. ROBERTS WILL ATTEST TO THIS. MS. ROBERTS WILL STATE THAT THE PUSH FOR NUMBERS WAS TREMENDOUS. APPRAISALS DEPENDED ON THE NUMBERS. SHE WAS ORDERED TO TRANSFER HUNDREDS OF COOK DUPAGE MEDICARE CASES TO HAYNES AT THE REGIONAL OFFICE. SHE WAS ORDERED TO COUNT THE RETIRED ALJS' DISPOSITIONS

BUT NOT THEM. SHE DID SO. THIS WAS DONE ORALLY & SHE SAW NOTHING IN WRITING. SHE FELT THAT THIS WAS NOT FOR GENERAL PUBLICATION. SHE FELT THAT THIS WAS WRONG, BUT SHE HAD TO FOLLOW ORDERS. ALJS DRZWIECKI, JONAS, NICCHITTA FELT THAT IT WAS WRONG.

BECAUSE OF THE UNREASONABLE PUSH FOR NUMBERS WHICH HURT THE QUALITY OF THE WORK, ACRIMONY WITH REGIONAL, UNFAIR APPRAISALS BASED ONLY ON NUMBERS, AND THE HIDING OF RETIRED ALJS, MS. ROBERTS WAS FORCED TO TAKE AN EARLY RETIREMENT IN 6/89. (EXHIBIT 20).

(3) ALJ SANNIER FROM LANSING WILL STATE THAT HAYNES "COOKED" THEIR MONTHLY FIGURES BY ADDING 19 MEDICARE DISPOSITIONS TO HIS MONTHLY TOTAL IN 9/89. (SEE: GROUP EXHIBIT 12).

(4) WE KNOW THAT CHICAGO (DT) GOT CREDIT FOR 165 OF HAYNES' 661 DISPOSITIONS IN 1989. LANSING GOT 19, AND OTHER OFFICES GOT CREDIT FOR MULTIPLE PERIODS DISPOSITIONS OUT OF THE 19. WHICH OFFICES GOT CREDIT FOR THE BALANCE OF HAYNES' REMAINING 477 DISPOSITIONS, WE DO NOT KNOW. GAO CAN EASILY FIND THIS OUT. GAO SHOULD GET THE RECORDS OF EVERY RETIRED ALJ WHO HEARD CASES, WHICH OFFICE GOT CREDIT FOR THE DISPOSITIONS, WHETHER THEY WERE COUNTED, WHO THOUGHT UP THE PLAN, WAS THERE ANYTHING IN WRITING, ETC. ALSO, GAO SHOULD FIND OUT WHAT OFFICES GOT CREDIT FOR THE REGIONAL CHIEFS' DISPOSITIONS, WERE THEY COUNTED, WHO CONCEIVED THE PLAN, & WAS ANYTHING IN WRITING, ETC.

(5) THE LAW REQUIRES THAT OPM WILL SELECT FROM ITS MASTER LIST OF RETIRED ALJS, IN ROTATION TO THE EXTENT PRACTICABLE, THOSE RETIRED JUDGES WHO IT DETERMINES MEET AGENCY REQUIREMENTS. THE AGENCY MUST SELCT FROM THAT LIST RETIRED ALJS FOR REEMPLOYMENT, AND MUST NOTIFY OPM OF ITS SELECTION. I DON'T BELIEVE THAT THIS WAS DONE WHEN SSA-OHA HIRED ITS RETIRED ALJS.

(6) ALJ HORN WILL STATE THAT HIS OFFICE'S DISPOSITIONS HAVE BEEN INFLATED SINCE 10/89 BY COUNTING AN ALJ'S PART "B" MEDICARE DISPOSITIONS, BUT NOT THE ALJ.

(7) THE "TOTALITY" OF THESE FACTS SHOW AN INTENT TO DECEIVE FOR PERSONAL GAIN BY USING THESE SCHEMES TO INFLATE THE DISPOSITIONS. IN REGION V, ITS MONTHLY REPORTS FAIL TO SHOW THE TOTAL NUMBER OF ALJS IN EACH OFFICE, OR THE TOTAL MONTHLY DISPOSITIONS FOR EACH OFFICE. (EXHIBIT 15). THIS IS IMPORTANT SINCE THE INFLATING COULD BE DONE WITHOUT ALERTING TOO MUCH ATTENTION. ALJS IN THEIR OWN OFFICES MIGHT NOT EVEN KNOW IT WAS BEING DONE. IT WAS DISCOVERED IN THE EVANSTON AND CHICAGO (W) OFFICES ONLY AFTER NOTICING THAT THE "AVERAGE MONTHLY DISPOSITIONS PER ALJ" SEEMED TOO HIGH. AFTER FURTHER CHECKING, THE ALJS DISCOVERED HOW IT WAS DONE. AS FAR AS I KNOW, NOTHING IN WRITING WAS ISSUED. IT WAS ALL ORAL ON A LIMITED MUST-KNOW BASIS. THE BASIC FACTS, THEMSELVES, REEK OF DECEPTION - "TO ONLY COUNT THE DISPOSITIONS BUT NOT THE JUDGE". THE ONLY REASONABLE INFERENCE FROM THIS IS THAT IT WAS A FRAUDULENT SCHEME TO INFLATE AVERAGES FOR CAREER PURPOSES.

III

REMEDY: TOTAL SEPARATION

THIS ROGUE AGENCY, SSA-OHA, HAS CAUSED ENOUGH PAIN FOR THE AMERICAN PEOPLE, CONGRESS, AND THE COURTS TO LAST 2 LIFETIMES. IT IS LIKE A ROGUE ELEPHANT RUNNING LOOSE IN POLITE SOCIETY. IT MUST BE DONE AW AY WITH. IT IS RUTHLESS, UNPREDICTABLE, AND UNTRUSTWORTHY. THE AGENCY'S HISTORY SINCE 1979, AND PRIOR, CLEARLY SHOWS THIS.

IN 1979, ROBERT TRACHTENBERG, HEAD OF OHA, WAS REMOVED FOR ENFORCING QUOTAS, AND OTHER ABUSES, AGAINST THE ALJS AFTER HE WAS SUED BY ALJ CHARLES BONO. THE AGENCY SOLEMNLY AGREED NOT TO DO THESE BAD THINGS AGAIN. THE AGREEMENT WAS KNOWN AS THE BONO SETTLEMENT (EXHIBIT 16). THIS AGREEMENT WAS TOTALLY AND BRAZENLY VIOLATED BY THE ROGUE AGENCY THEREAFTER. A CARETAKER, ANDREW YOUNG, WAS PUT IN. HE WAS NOT TO MAKE ANY WAVES WHILE THE AGENCY REGROUPED. THE REAGAN ADMINISTRATION TOOK OVER. LOU HAYS WAS PUT IN AS HEAD. HE IMMEDIATELY STARTED OPM REMOVAL ACTIONS AGAINST LOW PRODUCING ALJS. "ALL HELL" BROKE LOOSE AS SSA CALLOUSLY THREW OFF OF ITS DISABILITY ROLLS ABOUT ONE HALF MILLION PEOPLE TO SAVE MONEY. A HUGE PUBLIC BACKLASH OCCURRED WITH MANY LAWSUITS FILED. CONGRESS GOT INVOLVED (1984 REFORM ACT AMENDMENTS). OUR ASSOCIATION SUED HAYES. HE WAS REPLACED BY FRANK SMITH, ANOTHER CARETAKER. A NEW SSA COMMISSIONER WAS APPOINTED (HARDY). SHE REPLACED SMITH WITH BRADLEY. UNDER BRADLEY, ENOFF, HAYNES & OTHERS ONE OF THE MOST VICIOUS QUOTA ENFORCEMENT CAMPAIGNS EVER SEEN IN OHA WAS CONDUCTED. BRADLEY HAS NOW BEEN REPLACED (EXHIBIT 21). NO DOUBT THAT ANOTHER CARETAKER WILL BE APPOINTED.

THE NEW SSA COMMISSIONER (KING) HAS DENOUNCED THE RUTHLESS TACTICS OF HARDY, ENOFF, BRADLEY, HAYNES, AND OTHERS, EVEN THOUGH NO NAMES WERE MENTIONED. SHE CASTIGATED THE TREATMENT OF"PEOPLE AS NUMBERS IN A PRODUCTION QUOTA", A SENTIMENT SHE HAD VOICED BEFORE. (EXHIBIT 17). IT CLEARLY SHOWS SHE FELT THAT HER PREDECESSORS WERE CLEARLY WRONG AND "INDEFENSIBLE" FOR THEIR RUTHLESS PURSUIT OF QUOTA ENFORCEMENT ABUSES.

THIS RHETORIC IS REFRESHING BUT UNCONVINCING. THE INSTITUTIONAL DEFECT IS STILL IN PLACE WHICH ALLOWS THE AGENCY TO DO THIS AT ITS WHIM AND IT HAS DONE SO TIME AND TIME AGAIN. THE ALJS AND THE VITAL HEARING PROCESS CANNOT BE HOUSED UNDER THE WING OF THE AGENCY WHICH IS A PARTY TO THE HEARINGS. THE ALJS ARE AS VULNERABLE AS CHICKENS WHEN THE FOX IS ALLOWED INTO THE CHICKEN COOP ON HIS WORD THAT HE WILL BEHAVE. IS NOT ENOUGH, ENOUGH? THE STRING OF THE POLITICAL YOYO MUST BE SEVERED ONCE AND FOR ALL.

MY SUGGESTIONS ARE AS FOLLOWS:

(1) THE SSA ALJS SHOULD BE HOUSED IN AN INDEPENDENT AGENCY SUCH AS THE ALJS HEARING OCCUPATIONAL SAFETY AND HEALTH CASES.

(2) THE SSA ALJS SHOULD BE GIVEN THEIR INDIVIDUAL STAFFS BACK UNDER THEIR RATING AND CONTROL. IF ANY OF THEIR STAFF LEAVES, THEY WOULD BE ABLE TO HIRE THEIR NEW PEOPLE IN AN EXEMPT CATEGORY JUST LIKE THE

U. S. MAGISTRATES AND THE BANKRUPTCY JUDGES.

(3) THERE SHOULD BE PROVISIONS AGAINST INVOLUNTARY TRANSFERS OF ALJS, AND THE IMPOSITION OF GOALS, QUOTAS, ETC. AGAINST THE ALJS LIKE THF ONES PROTECTING SOME IRS EMPLOYEES (EXHIBIT 18).

(4) THERE SHOULD BE A NEW SYSTEM TO HEAR COMPLAINTS AGAINST ALJS. THE PRESENT SYSTEM OF LETTING OPM ALJS HEAR THE CASES HAS COME UNDER SUSPICION. IN THE LOU HAYS ERA, WITH THE AID OF OPM, SEVERAL "HANGING ALJS" WERE APPOINTED TO PERFORM THIS FUNCTION. HAYS KNEW THIS AND IMMEDIATELY WENT WILD. HE FILED A NUMBER OF REMOVAL ACTIONS AGAINST LOW PRODUCING ALJS. OHA WON ALL OF THEIR ACTIONS AT THE OPM ALJ LEVEL ALTHOUGH MSPB LATER REVERSED SEVERAL OF THEM. LARGE ATTORNEY FEES WERE AWARDED THESE VINDICATED ALJS. THIS SHOWED THE MINDSET OF THESE OPM ALJS. THE PRESENT OPM ALJ REIDY NEVER SAW AN AGENCY CASE AGAINST AN ALJ THAT HE "DIDN'T LOVE". HE HAS NEVER RULED AGAINST THE AGENCY IN SUCH A CASE. IN HIS MOST RECENT CASE, HE RECOMMENDED DISMISSAL OF AN ACTION BROUGHT BY THE LANSING ALJS AGAINST CHIEF HAYNES FOR THE ATROCITIES HE COMMITTED AGAINST THAT OFFICE. REIDY'S REASONING WAS STRAINED, FLAWED AND SHOWED A BIASSED MINDSET. THE CASE IS NOW ON APPEAL BEFORE MSPB. THIS SYSTEM SHOULD BE ABOLISHED SINCE EVEN AN ACCUSED ALJ IS ENTITLED TO A FAIR HEARING BEFORE A FAIR JUDGE.

THE RECOMMENDATIONS OF THE PRESTIGIOUS REPORT OF THE FEDERAL COURTS STUDY COMMITTEE SHOULD BE FOLLOWED, ALONG WITH THE OPINIONS OF THE AMERICAN MEDICAL ASSOCIATION (GROUP EXHIBIT 19).

I WISH TO THANK CHAIRMAN JACOBS AND ALL THE MEMBERS OF THE SUBCOMMITTEE FOR ALLOWING ME THE OPPORTUNITY TO APPEAR AND TO PRESENT MY VIEWS.

I ALSO THANK TOM SNEERINGER FROM CHAIRMAN ROSTENKOWSKI'S OFFICE, AND ELAINE FULTZ. WE WOULD NOT HAVE HAD THIS OPPORTUNITY IF IT WAS NOT FOR THEIR CARING, PROFESSIONAL ASSISTANCE, AND THEIR INTEREST IN THE ADMINISTRATION OF JUSTICE FOR THE AMERICAN PEOPLE.

Richard F. Sprague

RICHARD F. SPRAGUE
ADMINISTRATIVE LAW JUDGE

Chairman JACOBS. Judge Barone.

STATEMENT OF HON. RUSSELL S. BARONE, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, CHICAGO, ILL.

Mr. BARONE. I am Russell Barone, administrative law judge from the Chicago south office, Office of Hearings and Appeal. I am grateful to you for honoring me with the opportunity to address the subcommittee today.

I did prepare a written statement and I would ask that it be made a part of the record. The statement that I prepared and submitted I believe showed how a virtual quota system has been imposed on the ALJs in OHA. Now I want to emphasize for you and the subcommittee why that kind of system will not work in OHA. I do have to raise and paint for you a picture of our work. This really has not been done to my knowledge. I think it is important that you understand this. That is what generates strong feelings on my part and I hope will generate strong feelings on your part. It gives a better understanding.

First the work has to be done very carefully because we are dealing with defenseless people in our society. We have the hard work-

ing taxpayer who supports the system and can be shortchanged by improper decisions on the one hand, and disabled claimant's on the other hand who can suffer severe deprivation as a result of an improper decision. So they are both defenseless in a sense. The work has to be done carefully. What is the work generally? We are sworn to determine the nature and extent of a disease or illness claimed and the extent of its impact on a person's capacity to work.

How do we do it? First we have to review extensive documents. Sometimes these are volumes of records spanning a period of years: doctors', and hospitals' treatment records. We also have to look at work records and statements and reports of experts and lay persons.

We then have to elicit and evaluate the credibility of testimony from the claimant as well as medical and vocational experts, and lay witnesses. Many times we must then order more records, and investigation, and medical examinations, in order to understand the case better. Remember, we are concerned and faced with every mental and physical disorder known to man in medical science.

Once we have done all this, we are then required to analyze the evidence and make a decision in the case. But we are not finished yet. Before we are through with the case, we must finally prepare a written decision analyzing all the documentary and testimonial evidence in the case and spelling out in a defensible statement the rationale which supports the ultimate decision.

What results from our decisions? If we grant benefits to a deserving person, we have probably rescued him from desperation. If we deny a deserving person, we have probably abandoned him from hope of obtaining minimal shelter, food and medical care. If we grant benefits to an undeserving person, we have shortchanged the taxpayer and the Social Security trust fund out of many, many thousands of dollars in each case.

Now through all of this I have to emphasize that the question we are called upon to decide is not just whether or not a particular mental or physical disability is there—yes or no. We are not just hearing and deciding on the spot, much as a traffic court might decide whether you blew a stop sign or ran a red light. We also have to decide how severe the impairment is; and, considering the claimant's past work and age and education, we have to decide how much this impacts on his ability to perform the myriad tasks involved in the literally thousands of jobs that exist in the local and national economy. That is a broad question; and the responsibility to answer it properly is a heavy responsibility.

In light of the extent of this work, the individual nature of each case, and the sworn duty imposed by law on the judge alone for the proper performance, I ask how in the name of common sense and decency can anybody justify efforts to fragment this work by "reconfiguration" and mechanize it by quotas. It is the judge and the judge alone who is responsible for all this work and he only can render a decision in each case; a decision that serves the needs of justice in a particular case, unique and different from any other case—not a decision to serve some notion of macroeconomics or the needs of a system analyst who wants to predict and regulate the hearing process.

Yet, reconfiguration and quotas are what SSA has been about for the last 10 years in OHA. I ask you to reverse this trend. Separate the judges from their mechanical-minded task masters.

Finally I must add that judges should be removed for gross incompetence. But, let's develop and instill a healthy mental attitude in those responsible for this function. Let's not begin with the idea that ALJs are truants in a reform school who will not perform without the presence of a prompter or a goad before they have even done anything wrong. This not only offends the judges, but, more importantly it undermines our capacity to do justice for the thousands of deserving claimants who come before them and the millions of hardworking taxpayers who provide the money to support this system.

Chairman JACOBS. Thank you.

[The prepared statement follows:]

5417 W. Oakdale Drive
Oak Lawn, IL 60654
June 4, 1990

Hon. Andy Jacobs, Jr., M. C.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
U. S. House of Representatives
Washington, D. C.

Dear Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you today. I appear in personal capacity and do not purport to represent the Social Security Administration or anyone else.

My name is Russell S. Barone. I have been an Administrative Law Judge (ALJ) with the Social Security Administration (SSA) since 1980, and I am one of the more than 600 ALJs who participated in the study that led to the General Accounting Office (GAO) report of December 1989 "Many Administrative Law Judges Oppose Productivity Initiatives." As that report makes clear, a majority of SSA ALJs are locked in controversy with SSA over its management and control of the Office of Hearings and Appeals (OHA). OHA is that segment of SSA wherein the ALJs are organized.

In addition to participating in the GAO investigation of OHA, I believe I have been personally subjected to the abuse of illegal production quotas, imposed by SSA upon me and other ALJs in OHA. This abuse typifies the persisting reluctance of SSA to abide the independance mandated for ALJ's when Congress passed the Administrative Procedure Act (APA) 44 years ago. In fact, SSA has been so successful in frustrating the spirit of the APA that, on April 2, 1990, the prestigous Federal Courts Study Committee issued a report calling for legislation, over and above the APA, to protect the ALJs from improper SSA control.

The independence and freedom from improper agency influence for the ALJs in SSA is a matter of great importance. These ALJs are responsible for decisions of life and death importance to millions of Americans, the claimants who appeal SSA disallowance of retirement, medicare and/or disability benefits.

The following documents, attached as Exhibits, not only demonstrate the existence of SSA's problem with the APA, but I believe they also illustrate how SSA has been able to sustain an effective resistance to the spirit of this law over a period of years -- i.e. by first violating the letter and/or spirit of the APA, then acting so as to appear to relent when under scrutiny by this Subcommittee, and finally resuming the misbehavior once the scrutiny seems avoidable.

Exhibits

(1) EXHIBIT A: Pages 55 and 56 of the Report of the Federal Courts Study Committee, together with page 4 of that Committee's Tentative Recommendations issued for public comment on December 22, 1989, and pp. 39-40 and 64-65 of background study material compiled prior to issuance of the Tentative Recommendations. The April 1990 final report is the result of a 15 month examination conducted by Members of Congress, Federal judges, and a number of legal scholars. Consulting to the Committee were the Chief Justice, Associate Justices, Professors of Law, The Administrative Conference, the American Judicature Society, the Carnegie Foundation, the Brookings Institution, the Rand Corporation, and others. Strikingly appropriate to the subject of these hearings, the majority authors of the Final Report call for Congressional action to protect ALJs from undue SSA pressure by either creating a separate agency of ALJs or, at least, legislating " .... further safeguards within the Agency itself, to insulate the administratiave law judges' decisions from the influence of agency superiors." (page 56, supra).

(2) EXHIBIT B: A series of letters between the Chief ALJs in OHA and me relating to the recent denial of my request for transfer to Buffalo, New York, a duty station for which OHA had previously solicited transfer applications. The letters are: the Chief's to me of July 29, 1988; my response of August 11, 1988; the Chief's answer of August 29, 1988; my September 6 response thereto; my further letter of September 20, 1988; the Chief's confidential answer of October 25, 1988; and my final response to the Chief of November 7, 1988. No reply was received to my letter of November 7th.

While I no longer seek the transfer, the entire episode shows how false SSA became when it responded to Chairman Dan Rostenkowski on May 4, 1988, denying the existence of quotas in OHA (see EXHIBIT C below). I respectfully submit that the conflict is as brash as it is irreconcilable: at about the same time that I'm being told by SSA appointed managers in writing, that I cannot be transferred because, inter alia, I averaged only 31 dispositions per month instead of 37 this Congress is being told, in writing, by the Commissioner of SSA, that SSA imposes no quotas on its ALJs.

(3) EXHIBIT C: The letter of June 7, 1988 from the Honorable Dan Rostenkowski to the undersigned, enclosing a copy of the Chairman's letter of that date to the then Commissioner of Social Security. Mr. Rostenkowski comments upon the now issued GAO Report, he expresses concern over complaints from ALJs "across the country" about quotas in OHA, and he quotes the then Commissioner's response to his inquiry wherein she states ".... a vast difference exists between organizational goals and individual performance quotas ... performance quotas for ALJ's would be both illegal and unenforceable." Contrast this statement of the Commissioner with her Chief's statement to me in his letter of August 29, 1988, wherein he rationalizes the denial of my transfer request in terms of not meeting a National Average of 37 case dispositions per month per ALJ as follows:

> "In our most recent assessment, the period used was December 1987 through May 1988. During that period, average production for the Chicago South Hearing Office was 31 dispositions per ALJ, for the Chicago Region, 33 per ALJ, and for the nation, 37 per ALJ. It is true that your disposition level, which our records indicate averaged 31 cases per month, was the same as the average for the hearing office. However, the level is below both the regional and national figures." (p. 5, EXHIBIT B).

Contrast the former Commissioner's statement to Chairman Rostenkowski also with her Chief's initial transfer denial letter of July 29, 1988, wherein he invites me to get my production up for another try:

> "However, we do expect to offer additional reassignment opportunites next year. If you are still interested in changing locations at that time, your request will be given full consideration, according to the criteria noted above."

(4) EXHIBIT D: My personal response to the GAO Questionnaire which was circulated to all the ALJ's on OHA by GAO preparatory to its December 1989 Report. That Report, at the very least, faults SSA for its obsession with the quantity and relative unconcern with the quality of the work of ALJs in OHA.

(5) EXHIBIT E: Pages 1, 7-8 of the January 8, 1990 Memorandum from SSA's OHA Associate Commissioner to all her appointed Regional Chief Adminstrative Law Judges, with copies to all the SSA management appointed Hearing Office Chief Administrative Law Judges, along with the January 22, 1990 Memorandum on the same subject and the attached responses of two ALJs.

Here, only one month after the GAO Report had faulted SSA for attempting to quantify the work of an ALJ, we have a public confession of error transmitted by the Associate Commissioner. She paper records an apparent regret over a "far too long" overindulgence on the part of OHA and SSA in "....one statistic: the monthly dispositions per Administrative Law Judge." Since this abuse was at least 10 years old (cf. p,39 of EXHIBIT A), the Associate Commissioner seems a bit late and a little lite in her choice of words. That aside, however, the almost too coincidental proximity in time between her mea culpa and what appears to be the prior prompting GAO Report becomes estblished basis to doubt the sincerity of it all when the conference call described in the January 22 memo is considered. Now, just 11 days after the January 8 confession, the same management persons who heard the confession make it "indelibly clear" that "the monthly dispositions per Administrative Law Judge" is still the primary statistic indulged by OHA and SSA, even to the extent of relegating a shortage of personnel to the status of a non excuse for the failure to abide it.

(6) EXHIBIT F: A letter of June 1988 from Kenneth Paulini, the National Union Representative for the attorney advisors, who are hired to, among other things, assist the ALJs in OHA in the writing of their decisions. The letter is addressed to Chairman Rostenkowski, and it decries the manner in which SSA management, obsessed with quotas, has undermined the quality of ALJ work in OHA by indirectly imposing quotas upon them. He states: "OHA management is trying to do indirectly wht it cannot do directly. It cannot order the ALJ corps to produce 37 decisions each month, but if staff attorneys must produce at least 37 written ALJ decisions each month .... the pressure will nonetheless by on the ALJs to produce for the sake of the rest of the staff on the office." (p.3, EXHIBIT F).

(7) EXHIBIT G: The Itineraries of one visiting and one retired ALJ both dispatched by SSA managers to hear cases in the Chicago area. These ALJs are housed and fed at government expense and/or called in from retirement to pick up pay checks for temporary service in hearing dockets of cases at the direction of SSA management. Note the exorbitant numbers of cases scheduled by these judges for hearing in a palpably inadequate time period - - 26 hearings scheduled in 2 days by the visiting ALJ, and 54 cases set in 6 days running by the retired ALJ. Also a part of this exhibit please find page 2 of a statement forwarded by the aforesaid Mr. Paulini to the Office of Personnel Management on October 6, 1989, wherein he notes that over the past decade some four out of ten OHA ALJ decisions have not passed Federal Court scrutiny.

(8) EXHIBIT H: A roster of bonuses paid by SSA managers to themselves and their subordinates for, inter alia, performance that includes the direct and indirect imposition of quotas on ALJs above referred to. Thus the misbehavior grows and feeds upon itself.

(9) EXHIBIT I: Sample documents and statements, forwarded by concerned ALJs in response to the letter sent by my colleagues and myself on November 24, 1989. The responses emanate from Arkansas, California, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Missouri, Montana, Oklahoma, Pennsylvania, Texas, Virginia and Wisconsin.

(10) EXHIBIT J: My letters of April and May 1988 to the Honorable Dan Rosentkowski wherein I attempt to point out how divestiture of control over his essential staff by SSA management techniques (i.e. "reconfiguration" of office staff) is used by SSA to indirectly impose illegal quotas on ALJs. Attached to these letters is a suggested amendment to Section 205 (B) of the Social Security Act which would restore control to the ALJ over staff essential to the performance of his duties.

(11) EXHIBIT K: The November 22, 1989 letter of the Associate Commissioner in charge of OHA to me where she, despite the dissatisfaction therewith expressed by the majority of the more than 600 ALJs who cooperated in the abovementioned GAO Report of

December 1989, resists any change in the present system whereby ALJs are bereft of necessary control over essential support staff. Her veiled threat of "rehabilitation" is to be especially noted.

(12) EXHIBIT L: My March 22, 1990, letter to the new Chief ALJ of OHA, wherein I precondition my participation in his proposed "Advisory Council" on some acknowledgement by him of the basic problems that have persisted in OHA for so long a time. There has been no answer to this letter.

(13) EXHIBIT M: ALJ Sprague's letter of March 27, 1989, to the Office of Personnel Management distinguishing a recent court decision which the Associate Commissioner apparently relied upon in her stated intention to "rehabilitate" ALJs who may not measure up to SSA's "goals." As Judge Sprague points out, that New York Federal Appeals Court decision was reached without the benefit of knowledge about much of the SSA misbehavior detailed in the judge's March 27 letter, so that the court was still persuaded to give SSA the benefit of the doubt on the question of whether it was chasing "goals" or establishing quotas on ALJs.

(14) EXHIBIT N: A copy of my letter prepared on March 15, 1983, directing the attention of the Hon. Martin Russo to the concern of some U. S. Senators about proposals to downgrade ALJs in OHA at that time and some of the dangers in "reconfiguration." A 1982 Senate investigation and a law suit filed against SSA by the Association of Administrative Law Judges are both referenced in that letter.

(15) EXHIBIT O: A letter and enclosure of October 27, 1980, from ALJ O'Bryne in which the Association of Administrative Law Judges critiques the then proposed SSA experiment of "reconfiguration" (now an established modus operandi in OHA); and, ten years later, the letter of May 17, 1990 from the abovementioned Kenneth Paulini to O'Byrne, exemplifying some of the problems that fragmenting a judge and his staff thru reconfiguration has created. From a OHA "experiment" to begin separating control over his staff (including attorney advisors) from the ALJ in 1980, to the present scenario, there has come about great change indeed. Now, the eight judges in our office, who are still solely responsible under the law for deciding and approving written decisions prepared under their sole direction in cases before them, must negotiate with an outside Union Representative before they can decide which of the eight attorney advisors who have long been assigned to and working in our office, will write their respective decisions (see Mr. Paulini's letter of May 17, 1990). Again, it must be remembered that the attorney advisors are hired only to assist the ALJs by, among other duties, writing decisions for the judges who alone are responsible for directing that writing and signing those decisions.

I believe that the above described exhibits demonstrate the existence of a chronic problem in SSA's OHA. They detail a pattern of conduct, at least 10 years in duration, that evidences a basic misapprehension and/or mistrust of the function of its ALJs on the part of SSA. I also believe that these exhibits show how the December 1989 GAO Report may not have reached the root cause of the controversy between SSA management and its ALJs.

First of all, ALJs oppose "reconfiguration", "goals" and/or quotas because they are combined by management to engender a lock step "average" or fungible work performance from each ALJ. The ALJ's, of course, are not fungible machines, and the cases they hear are about a fungible as apples and oranges, involving as they do every conceivablwe mental and physical disorder that could befall a population of 200 million people and their subjective reactions thereto. As a result, these management initiatives have brought forth a legal absurdity and an economic disaster. We now have the spectacle in OHA of some outrageously high producting ALJs doing questionable work, with an expensive empire of bureaucrats counting, watching, and attempting to take credit for this "work." Moreover, this work, incalculably damaging in human terms, is fast becoming a product that no one wants to buy anyway: decisions that are turned back by the District Courts with disturbing frequency.

Secondly, the Federal Courts Study Committee Report of April 1990 shows how intractable the OHA ALJ problem has become: it now appears to well qualified observers that SSA-OHA is institutionally unsound, and that its ALJs need to be formally separated from the agency or need further insulation beyond the APA from an overbearing SSA management.

Thirdly, because it is so inextricably bound up with the overall problem, the "numbers game" deserves a few words of explanation. For want of a better tool, SSA relies upon a perfect right to indulge a mathematical abstraction (i.e. the average number of monthly ALJ case dispositions) to determine the number of persons it needs to hire for a given workload, even to signal possible problems for not meeting the standard. Then, however, it promptly proceeds to create this average. It carefully avoids a quiet and true ascertainment thereof. It does that by "reconfiguration", imposing direct quotas on ALJs and their essential support staff, hiring an army of bureaucrats to watch and count the work of the ALJs, paying themselves bonuses for doing these things and otherwise exhorting ALJs to conform to a preannounced number of dispositions per month. Worst is the use of this miscreant average to serve a purpose it could not serve: using it to determine the "goals" of OHA. No one contests the right of SSA to demand a day's work for a day's pay from its ALJs in the form of accurate and timely rendered decisions, but SSA has misused this right; and the false averages it has forced into existence create havoc and tend to undermine the fair hearing process in OHA. Further, even an accurate average of ALJ case dispositions could never be the per se standard by which to judge the performance of an ALJ. One simply cannot measure the quality of the water by the size of the measuring cup.

CONCLUSION

It seems that the OHA-ALJ problems derive in large part from an SSA attitude that the ALJs hired to independantly adjudicate the facts in the cases before them, need to be managed as opposed to supported and assisted in their work. Instead of assuming that its ALJs come to it with the integrity and wherewithal to do their job in an accurate and timely fashion, SSA seems to have an opposite perspective. In light of this, and in light of the dictates of both the Social Security Act and the APA, it seems reasonable to separate the ALJs from undue SSA influence in one of the ways suggested by the Federal Court Study Committee. Also, as Congress did in the case of the IRS, a specific prohibition against attempting to quota or goal the ALJs in OHA ought to be written into the law. At least, control over staff as suggested in Exhibit J should be restored to the ALJs. In this way, staff would respond to the needs of the ALJ they have been hired to assist, and not to the urgings of some bureaucrat odometer. Also, a honestly derived average case disposition rate, while serving to alert responsible peer groups to the possible existence of some deficit in an ALJ who persists in what common sense shows to be a major deviation therefrom, would not again be used to distort the function of an ALJ into matching pace with some mechanically ordained target on a bureaucrat's graph paper.

After all is said and done, it remains the right of a citizen to have a fair hearing in his appeal from an SSA denial of his medicare, old age, or disability claim; and a fair hearing in disputed cases requires an independent adjudicator. However, a adjudicator hearing factually distinict cases cannot be independent if he labors under a quota (especially a quota imposed by one of the parties contestant before him). SSA, for whatever reasons, has spent the last ten years trying to one way or another work a quota system in OHA. It has done this mainly by efforts directed to the control of an ALJ's essential staff and his work environment. Some structural separation of the ALJs from SSA and/or additional control over their work environment in SSA is required.

Sincerely,

Russell S. Barone

Chairman JACOBS. There has been a vote called.

Judge Drucker, if you can suspend for 10 minutes, we will come back.

[Recess.]

Chairman JACOBS. Judge Drucker, I am sorry for the interruption. I guess that is one advantage you judges have over Members of Congress, you are not interrupted this way.

STATEMENT OF HON. GILBERT DRUCKER, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, CHICAGO, ILL.

Mr. DRUCKER. Good morning. I am Judge Gilbert Drucker. I ask that my statement be included in the record. I am here at the request of the Association of Administrative Law Judges and in my own personal capacity. I was a U.S. attorney and prior to that I was senior trial attorney for the solicitor of the office of the Department of Labor. I had the honor of receiving the National Council of Aging's highest award for improving the lot of the aging.

It is my sad duty to inform you that the hearing process for claims by individuals for Social Security and Medicare benefits have been subverted by practices within the Social Security Administration—SSA. This has been caused by a policy of preoccupation with quantity over substance at the expense of the claimant seeking such benefits and the taxpayer.

A mad race for higher and higher numerical case disposition goals per ALJ that are falsely calculated has, I regret to say, sold out the integrity of the hearing process itself and created a climate of ALJ intimidation, coercion, and interference. The duty of an ALJ to provide a due process hearing for every individual claimant and the taxpayer has been emasculated or severely compromised. Hearings have not been, in many cases, complete or fair.

In calculating monthly case production goals for an ALJ, SSA has falsely counted the disposition of cases decided by other ALJs so that the monthly production goal for an ALJ is artificially higher than is actually the case. ALJs are then intimidated and coerced to reach these false goals. You have heard about the form that intimidation takes. Let me illustrate three. One, we had a case in my office where I noticed the regional ALJ had received credit for 165 cases. I could not figure out how he did it. I checked the mail log, checked the supervising attorney. She told me this judge had not participated, not written notes, not even signed a decision. I then at random made a copy of 15 percent of those decisions and I found the same thing. Not only that, all the cases were decided on the record and all involved the same provider. This was shocking to me.

Another point I would like to make, our office received a letter of commendation for turning out our 37 cases per judge. I could not figure that out either. I checked the mail log. Sure enough other judges had participated in achieving that goal. The letter of commendation was indeed false. What really made me aggravated so to speak was that in the Oasis, the official publication, the associate commissioner said, "We were not interested in the timely dispositions, they are meaningless if the quality of decision is affected."

Following that the new Commissioner, Ms. King, announced that she was berating all her managers because there had been a factory atmosphere created at Social Security and that she did not want to be a part of it. This type of action cannot continue to exist.

In a third example I saw that one judge listed himself as having an itinerary of 86 cases in 2 weeks. I defy anyone who knows anything about this process to demonstrate how a judge can hold a proper hearing of 86 cases in 2 weeks without a single medical adviser and vocational expert. That is beyond me.

Now the judges in the Office of Hearing and Appeals represent a unique type of judge. In one hat he has a duty to represent the claimant and see that the record is fully developed. It is the last time the claimant will have that opportunity for the most part.

In another hat he is supposed to represent the interests of the taxpayer. In the third hat he is supposed to represent the interests of justice. If we allow those types of practices to occur, we are not doing our job. The number of cases an ALJ decides is not the mark of a quality hearing nor a determinator of how hard the ALJ is working.

As these figures I mentioned illustrate, the opposite is true. If I want to turn out so many widgets I can do it, but I am here to represent the interests of the taxpayer and see to it that a claimant entitled to benefits gets a full, fair, and prompt hearing.

I submitted a few months ago a full description of what the hearing process consists of. It continues with the development of the record, properly questioning the witness to bring out pertinent facts, it starts with postdevelopment, in order to develop information that you learn and it finally ends with a decision with the ALJ giving coherent instructions as to how the decision is reached. You cannot do that on a production line.

We are not dealing here with widgets as Judge Barone has mentioned. We are dealing here with the tragedy of human beings, who are among the most helpless in America's society, whose only chance in many cases for benefits for themselves, their families and for obtaining Medicare benefits lies in a prompt, full and fair hearing.

I don't have to reiterate to you the horror stories that occurred in the 1980s. We don't want that to happen again and it will not happen again if there is a full and fair hearing. Now Commissioner King recognized these dangers when she said that she deplored this atmosphere. Let me also point out to you that in an era of budget deficits, the costs to the taxpayer resulting from the subversion of the hearing process is immense considering the average case costs $100,000. If 5,000 of these cases are heard incorrectly, the cost to the taxpayers is in the hundreds of millions.

Then they clog the courts and lead to further withdrawal of justice for other individuals. Moreover, if the decisions do not have a substantial basis, the Government pays under the Equal Access to Justice Act.

Finally let me say we have to do it again as Judge Barone stated because the cases come back. It only makes sense to do it right the first time. What do we do about it? We remedy this institutional defect by making the institution of a qualitative nature, dependent

on individuals controlling it who are primarily motivated by adjudicative concerns and not those of a quantitative bureaucracy.

Thank you.

Chairman JACOBS. Thank you.

[The prepared statement and a letter received prior to the hearing follow:]

TO: Honorable Andy Jacobs, Jr. (D. IND.)
Chairman, Subcommittee on Social Security,
Committee on Ways and Means,
U.S. House of Representatives

RE: Hearing on the Judicial Independence of
Administrative Law Judges

STATEMENT OF ADMINISTRATIVE LAW JUDGE (ALJ) GILBERT DRUCKER

My name is Gilbert Drucker. Since 1980 I have been an ALJ employed by OHA at its Chicago Downtown (DT) office. I was previously an Assistant United States Attorney. For a number of years I was a Senior and Supervisory Trial Attorney with the Solicitor's Office of the United States Department of Labor in Chicago where I specialized in the trial of employment discrimination and employment practice litigation. I am a recipient of the National Council on Aging's highest award for improving the condition of the older worker in American society and have written extensively in that area and testified before Congress on that subject.

It is my sad duty to report to you that the hearing process for claims by individuals for social security and medicare benefits have been subverted by practices within the Social Security Administration (SSA). This has been caused by a policy of preoccupation with quantity over substance at the expense of the claimant seeking such benefits and the taxpayer.

A mad race for higher and higher numerical case disposition goals per ALJ that are falsely calculated has, I regret to say, sold out the integrity of the hearing process itself and created a climate of ALJ intimidation, coercion, and interference. The duty of an ALJ to provide a due process hearing for every individual claimant and the taxpayer has been emasculated or severely compromised. Hearings have not been, in many cases, complete or fair.

In calculating monthly case production goals for an ALJ, SSA has falsely counted the disposition of cases decided by other ALJs so that the monthly production goal for an ALJ is artifically higher than is actually the case. ALJs are then intimidated and coerced to reach these false goals. This interference through intimidation and coercion takes many forms. Hearing offices are threatened with closing, resource and staff cutbacks were promised, and refusal of benefits, such as travel and case assignments became the order of the day.

Let me now illustrate to you a small sample of some vivid and I believe shocking subversive practices.

1. I noticed in 1989 that in reviewing the Chicago (DT) log of decisions mailed for the months of February through May 1989 that the Region V Regional Chief Administrative Law Judge was listed as deciding and given credit for mailing a total of approximately 165 decisions. He was of course not counted as an assigned Judge in computing the average for ALJ dispositions at Chicago DT. I was totally surprised, as this Judge had not, to my knowledge, been physically present in the office, let alone have heard a case for production credit for my office. Of these decisions, 55 alone were listed as being mailed between February 13 and 27, 1989. Since these facts were so unusual, I inquired of our supervising staff attorney if to her knowledge this Judge had heard any cases during this period, issued any instructions for decisions on each case, or signed any decisions. She stated, No.

My indignation at this apparent misconduct was deeply aroused as this conduct calls into question not only the fairness and integrity of the hearing process but the oath of office that every Administrative Law Judge takes for his position. I therefore, at random, selected 15 of the 165 cases for review. I found that every one of these cases was a Part A, Medicare case which was reversed "on the record" in favor of the provider, who in each case was the same, Cook-DuPage Home Health Care Service.

I noted further that none of the decision instructions were from this Judge, nor was there any record of whether the draft or final decision had been seen or physically signed by him. In practically every case the instructions were cursory and standardized. I saw little evidence of an individualized analysis and rationale. It was also interesting to note that on May 22, 1989, this Judge received a promotion to GS-16.

If this type of apparent fraud and misconduct summarized above represent the new criteria for promotion, the integrity and fairness of the hearing process is destroyed as is the meaning of the ALJs oath of office. I have since learned that the facts outlined above have been confirmed by Judges from other hearing offices, in Region V, who reported that this Judge engaged in practices similar to those I have summarized at their offices.

If requested, I will supply you with a copy of the hearing log and the random selection of decisions.

2. To inflate the production of permanently assigned ALJs, SSA temporarily employed retired Judges to hear and dispose of cases. The latter's production was then assigned to the former, thereby falsely inflating the average dispositions per ALJ. To illustrate the impact of these practices, in November 1989, the Chicago DT office was credited with disposing of a total of 333 cases for an average of 37 for 9 permanently assigned Judges. For this sterling production, OHA Chicago DT received a letter of commendation from the Associate Commissioner of SSA. In fact, this 37 average was false. Two retired Judges had disposed of 39 cases at Chicago DT during this month according to OHA's own mailing log for that month. If the 333 cases were properly divided by 11 (to include the retired ALJ production), the average in reality is 30 per ALJ, not 37. Retired Judges were then reemployed depending apparently on who turned out the greatest number of cases, not how they conducted a full and fair hearing. For example, projected over a year for just 9 Judges, this is an inflated average of 84 more cases per year or over 1,000 more cases than was really the case for just one office.

This juggling of figures is not a meaningless exercise. It becomes particularly meaningful if Congress wishes to rely on agency statistics to determine the need for more ALJs, ALJ support staff and resources to assure that the hearing process is conducted in a fair, full and timely manner, let alone budgetary considerations.

Commissioner King recognized these dangers when in early 1990 (shortly after Chicago DTs falsely accredited commendation) she stated she deplored a factory type atmosphere and suspended goals for SSA employees. The horse, however, is already out of the barn as my experience has shown that the same or worse practices can be reinstituted by SSA under the present functional structure. The problems therefore are institutional, not personal and they must be remedied by structural and operational changes in the system that are the province of this body.

3. The preoccupation with statistics has led to a subversion of the hearing process itself. This results from ALJs being intimidated into believing they must achieve false production goals by threats of retaliation, to other ALJs seeking rewards for achieving such goals (for example, transfers, added resources, case assignments), to retired Judges seeking to be retained to hear cases. In an effort to "chase" after these skewed goals, some ALJs will take short cuts by not properly developing the record before the hearing, not fully questioning witnesses, and not engaging in proper post hearing development. This short cutting of the process continues into the deliberative stage and the instructions an ALJ may issue to an attorney advisor in drafting a decision.

This interference and intimidation of the hearing process is pervasive. On one end of the spectrum, an ALJ in an effort to achieve a numerical goal will reverse more cases than he probably should and award benefits to the claimant (knowing that rarely are such reversals challenged by SSA), and on the other end of the spectrum, an ALJ will not because it takes more time to properly develop the record for the hearing on behalf of the claimant, thus denying the claimant the hearing process he is entitled to. This in turn can cause an improper denial of benefits.

Consider a retired Judge is listed for a 2 week period (7-24 to 8-2-89) as scheduling 86 cases for hearing at the Chicago DT office, 9 cases a day without a single medical expert or vocational expert being called to testify (in this regard, SSA has appeared to be paying lip service to the need for medical advisors and vocational experts by an occasional memorandum or Order from the Appeals Council, while bombarding ALJs with higher and higher production goals).

I defy anyone familiar with the hearing process to demonstrate how such a hearing schedule can result in the full, fair and individualized hearing process required by law.

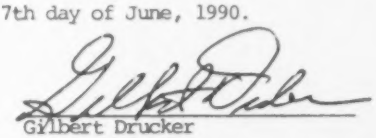
If requested, I will supply you with a copy of this schedule.

What is the sum and substance of these fraudulent, corruptive and misleading practices, Congress is misled, claimants suffer and the cost to the taxpayer is enormous.

I have related to you a pattern of misconduct that demonstrates the need for Congress to take steps to strengthen the independence of the ALJ and restructure and restore the validity of the hearing process. What I have related to you is alarming. What may be even more alarming is that we may only be looking at the tip of the iceberg, as these practices may well be of a nationwide nature. I sincerely hope they are not.

I respectfully ask this Committee to take legislative steps to reestablish the integrity of the hearing process.

Dated at Des Plaines, Illinois this 7th day of June, 1990.



Gilbert Drucker

9366 Twin Oaks Lane
Des Plaines, Il 60016
(708) 635-9682

December 28, 1989
Des Plaines, Illinois

Honorable Andrew Jacobs Jr.
Chairman, Subcommitte On Social Security
Committee On Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

RE: The Appeals Process In The
Social Security Administration

Dear Congressman Jacobs:

My name is Gilbert Drucker, I am a past recipient of the Ollie A. Randall Award of the National Council On The Aging for making the most significant contribution in the United States toward advancing the cause of older persons in a particular year. I also have written extensively in this area and to furtner acquaint you with my background I am enclosing a copy of my biography.

Since September 1980, I have been a United States Administrative Law Judge (ALJ) assigned to the Office of Hearings and Appeals (OHA) in the Chicago Downtown office. It is my understanding that early next year your subcommittee intends to hold hearings on the question of appeals in the Social Security Administration (SSA).

The purpose of this letter is to give you the benefit of my experience in the problem areas I have encountered. To begin, I am sure that by this time through Administrative Law Judge Sprague and others you have become familiar with the questions surrounding the use of production goals, reconfrigureration, and the state of morale of Administrative Law Judges and OHA employees in the hearing process. I therefore will not burden you with repeating the thrust of those problems with which I concur do exist.

As you know, these problems have been discussed in a recent report of investigation sent to you on December 7, 1989 by the General Accounting Office (GAO). This report reviewed the causes for recent conflicts between SSA's Office of Hearings and Appeals, Management and ALJ's, and whether reductions in staff especially in judges adversely affect the adjudicative process.

This letter will specifically comment on the questions raised in the GAO report, which I believe with all due respect, does not fully consider and explain the scope of the hearing process itself. I will also respectively suggest to you some areas where legislation may be appropiate.

The GAO study recommends that SSA conduct a study to determine the appropiate number of cases that ALJ's should be expected to decide giving proper balance to the, "quality of decisions," so that such study could be used for establishing reasonable monthly production goals.

This recommendation assumes as a premise that the concept of goals even before the study is conducted are feasible. It refers only to considering the quality of decisions as a essential element. However, this statement is based on a incomplete premise as it does not reflect consideration and analysis of the mandatory elements of the hearing process itself.

The hearing process mandated by Congress and implemented in the regulations of SSA and decisions of the courts consists of much more than the quality of the decision itself. A decision can only as good as the content of the hearing process that preceeded it.

The hearing process consists of there distinct parts, one the pre-hearing stage, secondly the hearing itself, and thirdly the post development and deliberative stage. All three of these parts must be thoroughly complied with in accordance with established legal principles before one can even begin discussing or analyzing the quality of the ALJ decision. Simply put the decision cannot be looked at in a vaccum.

The first part of the pre-hearing process begins with the receipt of the case in the hearing office. There among other things the file is "stripped" i.e. the relevant and material documents are put in proper exhibit order. This includes numbering the pages of each exhibit properly and marking for example eash separate hospital or medical reports as a seperate exhibit. It also includes putting such parts of a exhibit as a discharge summary, history and admission, and tests such as x-rays and stress EKG's in a hospital in proper order. If the OHA employee performs this function based primarly on a numerical goal basis without regard to quality this prevents the ALJ from properly analyzing the case.

Another necessary ingrediant of this first step is to make as a part of the exhibit file the professional qualifications of the physicians involved. The OHA employee must xerox from a particular States list of physicians their qualifications so the ALJ can determine based on a physicians field of expertise the weight to be given to their findings and opinions as mandated by the courts.

Further, the Congress in 1984 mandated in section 9(B) of the Social Security Disability Benefits Reform Act of 1984 (DBRA) that the Secretary (in the hearing process, the ALJ) shall make every reasonable effort to obtain all medical evidence regarding the claimant's condition particularly that of the preceding 12 months. Thus, the burden is on the ALJ to make sure that all evidence not previously considered be obtained, before the hearing itself begins, wherever possible. This process can be time consuming.

The ALJ then as part of the first step must review and analyze the case itself. This includes a analysis of the need for medical advisors, vocational experts and a thorough analysis of the record itself, including the consistency of the prior statements of the claimant, the conflicts, if any, in the medical evidence, the vocational and educational aspects of the claimant's background and at the minimum a outline of the types of questions he may wish to ask the claimant, (e.g., his complaints, degree of and frequency of pain, effects of medications, medical treatment, his activities, his educational and vocational background with emphasis on the skill and exertion required in his past jobs) as well as questions to the medical advisor (e.g. are the "listings" met or equalled, how and on what basis does he resolve conflicts in the medical ecidence, are the claimant's complaints credible in that they are reasonably related to the medically determinable signs, findings, or abnormalities, and the onset date and duration of the claimant's impairments and his opinion as to how they affect the claimant's ability to function) and finally questions to the vocational expert (these include opinions as to the skill and exertional level of the claimant's jobs for the past 15 years, whether the claimant's skills are transferable to a ready and highly marketaole degree, and hypothetical questions based on the favorable as well as unfavorable evidence to the claimant) are all asked by the ALJ.

It is thus apparent, that this first step in the pre-hearing process is time consuming, and it is based on my experience as a ALJ, a process that on the average takes approximately 1 1/2 hours per case. There are cases when the time spent may be much less (e.g. "on the record decisions" where the claimant's entitlement to disability is apparent) or much more (e.g. more complex cases involving pain, suviovorship and overpayments, mental impairments and multiple expert testimony).

The second step, is the actual hearing itself where the ALJ as part of his, "three hat duty," under the law (making sure the claimant recieve a thorough, fair and impartial hearing, represent the interests of the taxpayer, e.g., the trust fund in Title II cases and adjudicate the case in accordance with the law) must make sure the claimant is fully advised of his right to representation, decide whether further development is needed of the record before the proceeding, analyze the new evidence supplied at the time of the hearing, question fully the claimant and all additional witnesses brought by the claimant, question the various expert witnesses, e.g. medical advisors, vocational and rehabilitation experts, and listen to and analyze the claimant's representatives questions and the answers obtained to determine if redirect examination of such witnesses are necessary.

This second step which is the heart of the hearing process itself must be thorough, fair, and impartial to all parties. Viewing this step from my prospective of 20 years, of trial experience as a lawyer as well as my experience as a ALJ this step is in many ways more difficult than cases where both parties are represented by counsel, as the ALJ is under constant mental pressure not only to develop the records for all parties but to decide the case fairly as well as promptly.

Based on my experience as an ALJ I would estimate that the second step in the average cases would take approximately 1 1/2 to 2 1/2 hours of time. This is a average and some cases take much less time while others take much more.

I now turn to the third step of the hearing process which is the post development and delibrative stage. Here, the ALJ after the hearing must decide whether to grant a claimant's request for more development, or on his own motion, based on what occured at the hearing or the stage of the evidence, obtain further evidence, so that as required by the law he has fully developed the record. This can include and does in many cases require post hearing consultative examinations of the claimant, obtaining further investigation or evidence, and in a significant number of cases supplemental hearings and proceedings (e.g. the use of interrogatories to experts).

What the two steps I have discussed demonstrate is that the quality of the decision is only as good as the thoroughness, fairness and impartially of the steps preceeding it. If the two steps preceeding the third step are incomplete or improper the decision cannot cure the handling of the case itself. Improper completion of the three steps by the ALJ will most likely result in justice denied to the claimant and SSA and further costs to the taxpayers.

Assuming the case is now ready for decision we now turn to that part of the third step which I will entitle the deliberative process. This step requires the ALJ to sift and analyze all the relevant and material evidence (both oral and documentary which may be quite voluminous), reconcile differences, determine credibility (e.g. are the statements of the claimant or others to SSA consistent with that those made at the hearing, is the appearance of the claimant at the hearing considering his symptoms consistant with previous evidence in the record), determine the weight to be given expert and lay evidence and opinions, research the law, and apply it to the facts in the manner required by accepted legal principles.

The ALJ must then write the decision (here the ALJ drafts detailed instructions to a "decision writer" a term coined by SSA which is a misnomer as this OHA employee does not write a decision. Similar to a district court judge law clerk, he prepares a draft of the decision for review by the ALJ. This requires the ALJ to indentify from the record where in the testimony, exhibits (by exhibit number and page number) he bases his findings and rationale, relating such discussion of all the relevant and material evidence to the findings and rationale in support of the decision itself in a legally sufficent manner, so that the decision will stand up under legal scrutiny either by the Appeals Council or the courts.

My notes to the "decision writer" (the attorney advisor) usually encompass about 7 pages of instructions. The attorney advisor then submits a first draft of the "decision" to the ALJ who then reviews it, rewrites portions if necessary, and makes corrections.

A final decision is then typed with the proper corrections made. It is signed by the ALJ and issued where it becomes, unless reversed, the final decision of the Secretary of Health and Human Services (Secretary).

Based on my experience this third step on the average takes one to one and a half hours. There are of course many cases above and below this mean.

These three steps are of course not all of the duties that are required of an ALJ. He must constantly keep up with changes in the law, regulations, court decisions, rulings by SSA, and various memorandums and circulars issued by SSA, and approve after analysis the correctness of attorney fees. For example, in the years 1984-1989 there were 159 rulings (these are binding on the ALJ) with which the ALJ must become thoroughly familiar, numerous changes in the regulations and countless memoranda from SSA. To keep abreast of this material requires in my opinion at least 1 to 2 days of working time. This factor must be considered in any analysis of the time avalible to a ALJ for the hearing process in any month.

Moreover, an ALJ is not a machine. I find most ALJ's including myself require a break from constantly hearing and deciding cases in order to avoid mental burn out. This is not a unusual phenomona and I believe it is common to those who perform judicial type duties.

In human and financial terms I would like at this juncture to illistrate the tragic effect on claimants, the effect on taxpayers and the financial cost of not properly complying with the three steps discussed. These illustrations unless otherwise indicated represent cases I have heard. I have copies of the actual decisions, but to avoid possible problems under the Privacy Act I have not enclosed them:

1. A 31 year old claimant filed a Title II application for social security disability benefits in May 1989, alleging he was disabled since August 1985 due to back problems. At the hearing the claimant was represented by counsel. The record revealed that in a four year period the claimant underwent 4 surgical proceedures including a decompression and fusion of the spine. I found that the claimant was entitled to benefits under sections 1.05(c) of the "Listings" (20 CFR 404.1525, appendix 1, Section 1.05(c).

Moreover, because I took the time to properly review the case before the hearing, I noticed that in his 1989 application the claimant had stated he had filed a prior application in 1987 (a fact not noticed by his counsel) I, on my own motion re-opened the prior application (which was filed within four years of the date of the claimant's applications initial determination) under 20 CFR 404.988-989). The evidence when viewed longitudinally as required by the law was new and material evidence. I thus, awarded the claimant a period of disability from August 1985. This resulted in the claimant and his dependents recieving approximately 3 years more worth of benefits, approximately $40,000; not counting medicare benefits.

2. A 62 year old claimant in August 1988 filed a social security disability claim alleging that since September, 1982 he was unable to work due to arthritis. The record revealed that he was last insured for entitlement to disability benefits in September, 1982. There were no prior applications. This meant that the claimant had to demonstrate that he was disabled on or before September 1982 to succeed in his claim. A non-examining physician medical advisor after reviewing the record before the hearing level, opined in a residual functional assessment, that the claimant was capable of light work in September, 1982 and the therefore, he could return to his past work as a industrial designer.

In reviewing the record I noticed in one of the pages of the physician's assessment about 6 lines, these lines stated that a 1976 x-ray of the claimant revealed a ankylosis spondylosis of the spine (a condition where the spine becomes fixed or frozen) which "provided adequate support" for the claimant's complaints of lack of motion, etc. This statement contradicted the physicians opinion and had I not reviewed the record thoroughly it would have escaped notice. Needless to say the claimant was granted benefits.

3. A claimant filed a disability claim. A review of the record indicates in one of the questions in his application that he also filed a workment compensation claim. He is granted disability benefits by me but because a ALJ (or his hearing assistant) took the time to review the record revealed a workmens compensation claim, the SSA benefits may be reduced because of the compensation claim, a so called offset. This occurs frequently and if discovered by the ALJ results in considerable savings to the trust fund and taxpayers.

4. My review of the costs to the trust fund and taxpayer of granting benefits in a average SSA disability case is about $100,000.00 not counting administrative costs, e.g. reversal of decisions due to not following one or more of the three steps discussed. Consider, a 25 year old individual granted benefits of $900 a month will recieve them if disability continues to age 65. This is a total cost to the taxpayers of at least $432,000.00, not counting medicare costs. These figures speak for themselves, and become particularly dramatic when you consider the number of cases a ALJ hears in a particular year. Multiply that by the nearly 700 ALJ's hearing these cases.

Just recently on October 25, 1989 one of my decisions disallowing benefits in a relatively simple case with no medical and vocational expert testimony was affirmed by the court, Reed Vs. Secretary Civil Action No. 88C796, D.C.E.D. Il. A very thorough 14 page decision was issued by the court and it aptly demonstrates how thorough and detailed the three steps, I have discussed must be. As the Privacy Act no longer applies I am attaching a copy of the courts opinion (the district court adopted the report and recommendation of the mangistrate) as well as my opinion of February 23, 1986 of 7 pages.

Moreover, the GAO report does not in discussing the monthly disposition of cases from 1975-1988 (p.3) consider the effects on the hearing process as a result of the DBRA. This Act has made the process much more complex and has therefore increased the complexity of the three steps discussed herein.

Consider, section 4 of the DBRA requires the ALJ to consider the claimants impairments, physical and mental, singly and in combination with each other, regardless of whether they are singly severe in nature or not. This represents a significant departure from the previous law which only required the ALJ to consider impairments that are severe (i.e. those that affect basic work functions). Thus, the ALJ if for example there are four impairments, must in effect have four or more mini-hearings on each seperate impairment. This obviously takes a lot more time to accomplish then under the previous law.

Consider, further section 2 of the DBRA required medical improvement of a individuals impairment or combination of impairments that demonstrates that the indivudal has regained the ability to work before benefits previously granted can be properly ceased. This is a complex standard which to effecuate requires considerable analysis in each of the three steps I have discussed which was not present in the previous law. It should be noted at this point that it was the recognized excesses of the cessation review of 1980-1984 that led to the DBRA. Again a dramatic illustration of the effect of quanity vs. quality.

Finally, consider section 5 of the DBRA dealing with mental impairments. It is particularly the handling of mental impairments in 1980-1984 by SSA that led to the enactment of this section. As a result new regulations have recently been issued to Governmental impairment adjudication by SSA (20 CFR 404.1525, Appendix A, Sections 12.00-12.09). They are extremely complex note the detail required to be developed and ascertained as part of the hearing process in sections 12.00A-I.

Clearly the DBRA must be factored into any analysis and discussion of the appeals process and the proper method and the amount of time required by the ALJ to properly perform his duties.

As has been demonstrated we are not dealing here with the production of "widgets" where quantitative measures determine competence. What we are dealing with are human problems of individual human beings each with his own particular set of circumstances. Each case as mandated by Congress must be dealt with in a individual manner. Accordingly, qualitative measurment of performance must be of primary significance, not quantatative.

While I recognize that for budgetary and planning purposes a production goal for ALJ decisions may, if feasable, have merit. Given the individual nature of each case, the primary and controlling (unless the facts in a particular case demonstrate that a ALJ is only hearing a extremely low number of cases consistentley, without reason) measure of a ALJ's competency must be the quality of his work. Thus, it is my opinion that the use of a production goal for ALJ decisions can only have limited purposes It cannot be used as a measure of a ALJ's competency if the ALJ is performing his ALJ duties properly in the manner I have discussed. Any other policy would have a serious chilling effect on the thoroughness, fairness and impartiality of the hearing process as with the power to set production gaols for competency purposes comes direct or indirect control or influence over the process itself.

I now turn to the need for legislation to ensure that the appeals process is performing in the manner mandated.

I am extremely gratified by the comments of the new Commissioner Of Social Security, M.S. Gwendolyn S. King. I note that she has stated that we need a more human oriented approach, theres a hungering for a new direction, technology she doubts will replace personal contact (New York Times December 15, 1989). She further has stated I will not tolerate improper handling of cases, if one beneficiary is wrongly denied benefits, this is a tragedy, and we (SSA) will not permit it to take place (Chicago Tribune, December 19, 1989).

I beleive Ms. King's personal intentions, however the problem is proper implementation of the process and this is not a personal problem but a institutional one.

The institutional defect in the present system is apparent. The SSA which makes the intial determination of an individuals claim to Social Security benefits (or Supplemental Security Income Benefits) under the present system controls or influences directly or indirectly the hearing process by its use of such devices as production goals, resources or benefits to the ALJ (e.g. transfers, office facilities, travel to desirable locations, personnel and equipment). While the ALJ does theoretically have decisional independence under the Administrative Proceedure Act (APA), 5 U.S.C. SS4, this control is in reality illusory as it e.g. results in on one end of the spectrum, hasty decisions by ALJ's granting undeserving benefits to beneficiaries in a effort to acheive production goals (which SSA rarely questions) at great cost to the taxpayers, and at the other end of the spectrum in improper adherence to the three steps of the hearing process I have discussed to the detriment of the beneficiaries. You of course have seen other methods of control, witness the excesses that led to the DBRA.

The hearing process thus becomes skewed as the ALJ in his difficult "three hat duty" of in effect representing the agency the beneficiary and the interests of justice (a fair, full and impartial hearing) is subject qualitatively to the control of the same agency (SSA and its subsidiary OHA) that makes both the initial and final decision of the agency.

In the past 8-10 years there have been numerous Commissioners Of Social Security, Associate Commissioners (the manager of OHA is a associate commissoner responsible to the Commissioner who oversees SSA operations) and Chief Administrative Law Judges (the latter is appointed by the Associate Commissioner and serves at the pleasure of the Commissioner or Associate Commissioner. (He has little operative and managment power). The Commissioner and Associate commissioners are considered political type appointees.

As a result, administration of the appeals process has become erratic and inconsistent, because many appointees and senior executive service (SES) employees are subject to political pressures or are in many cases influenced by the desire to receive performance bonuses which are based on quantatative measurments, i.e. disposition of cases. Since many of them are not quality or career oriented, the quality of the hearing process is not a primary consideration, and suffers; although they may by issuing a few memos pay in essence lip service to the quality of the hearing process while the overwhelming thrust of their managment is the use of quantative measurments as the Commissioner has control over all segments of SSA.

I realize there may be no one solution to solve the problems I have discussed. In a effort to be constructive I would respectively suggest the following type legislation in principle.

By Congressional act separate the OHA component of SSA from SSA and have it directly put under the Office of the Secretary as a separate operational and functional entity. The hearing process has been considered by the courts as a judicial type function with the ALJ duties being equvalent to that of a judicial officer. The appeals process requires a denovo determination by a impartial ALJ, therefore the appeals process should not be subject to the control, managment, or otherwise of SSA which made the initial decisions in a case before it reached the hearing level. Since the decision of the ALJ becomes the final decision of the Secretary I submit it only makes sense to have the appeals process connected to him. OHA then would have jurisdiction to hear all cases requiring administrative hearings by HHS.

To avoid inconsistency, political pressure, and revolving door appointments I suggest a Chief ALJ be appointed to administer OHA as this is a judicial type function. He should be appointed for a six year term, to avoid partisanship and be confirmed by the Senate. OHA should, at the least prepare its own identifiable budget to be submitted as part of the HHS budget which is of course overseen by OMB and Congress. OHA ALJS should continue to be hired under the present standards by the Office Of Personnel Management. Other employees and assets of OHA can be transfered to this new component of HHS. The cost of implementing this legislation would I believe be negligible. The benefits I submit would be enormous and would better ensure that the OHA appeals process is just, human and efficent.

I hope this letter will be of some assistance to you and the committee in its hearings. Should you have any questions or if you believe I can be of any assistance to you please do not hesitate to communicate with me.

Enclosures:

Respectfully,

Gilbert Drucker

Gilbert Drucker
United States Administrative Law Judge
9366 Twin Oaks Lane
Des Plaines, Illinois 60016

Home Phone: (708) 651-9682
Office Phone: (312) 353-2973
FTS Phone: 353-2973

Chairman JACOBS. We asked the GAO to stay because we made the request for a study of Judge Haynes' record. Do you have some information for us with respect to that?

Mr. MCDONALD. In response to your question, Mr. Chairman, we delivered a letter to you this morning that I believe is also available on the table over here that reports the statistical answers to six questions that you had asked us relative to Medicare part A and Medicare part B decisions rendered both nationally and within the Chicago region.

There are a series of tables that are within that letter that purport those numbers. I would caveat that with the fact that the numbers are obtained from the Office of Hearing and Appeals Management Information System and they report all the case statistics for fiscal year 1989. As we have been able to determine them they are including those cases where cases were determined on the

record and those where there were decisions on the basis of hearings.

The letter provides comparative statistics across the regions to show the relative case load. The work is still in progress. What we do not have in that letter is an explanation of why specific numbers look the way they look. What we have are the numbers which can be taken on their face.

Chairman JACOBS. I guess that ought to be included in the record. My letter to the GAO is in front of me. The responses that are summarized here are fairly concise. Can you do that for the record?

Mr. MCDONALD. Do you want me to go through each of those?

Chairman JACOBS. There are six. The questions are specific and the answers are specific numbers so there is probably room on the record.

Mr. MCDONALD. Your letter had six specific questions that GAO answered. The first two questions you asked were for statistics showing what proportion of Medicare appeals were decided by ALJs on the record, specifically that is without a hearing, and what general categories, if any, those appealed decisions fell into. We have provided you a specific table that for each of the regions in the country shows the total number of decisions in fiscal year 1989 that were rendered in the region, the number of those decisions, this is for Medicare part A specifically, the number of those decisions that were rendered on the record without a hearing and a percentage calculation of what those hearings on the record were compared to all hearings.

What you will see is that, nationally hearings on the record for Medicare part A made up an average of 28 percent of the total hearings.

The second table that we have provided you deals again with Medicare part A decisions and approval rates. The table for each of the regions lists the total number of decisions by the region, the percent of those total decisions that were approvals, it then breaks out the number of decisions with a hearing and the percent of those that were approved and the number without a hearing and the percent of those that were approved. What you will see is relatively consistent that on a nationwide basis the approval decisions were running about 82 percent in fiscal 1989.

For those decisions with a hearing the percentage approval rate was slightly higher, about 83 percent. For those done on the record, the approval percentage was slightly lower, 77 percent on a nationwide basis. You will see the breakdown for each of the regions.

There were, in fiscal year 1989, 421 Medicare part B cases. As I believe has been alluded to in prior testimony, about 41 percent of those were approvals; 96 of those decisions or 23 percent were decided without a hearing—on the record. The approval rate for on the record decisions for Medicare part B was 32 percent when there was no hearing and 44 percent when there was a specific hearing held. Again this is a nationwide statistic.

Your third question asked us to determine the extent that retired ALJs participated in Medicare decisions. In fiscal 1989, the Social Security Administration used five retired administrative law judges to decide Medicare and/or title II disability cases. So there

were five judges nationwide used on all type decisions. They rendered a total of 6 Medicare and 873 disability decisions. There is a table in the letter that shows the impact of the retired ALJs on the regional dispositions.

That impact was minimal. It existed in four regions, Chicago, Philadelphia, Dallas, and San Francisco. The disposition of those cases is shown and in the highest instances, Chicago and Philadelphia, the retired judges' dispositions totaled around 1 percent of the total disposition in the region in that period. In the other two regions, Dallas and San Francisco, it was less than 1 percent of the dispositions that were heard.

Your question four asked us to determine how many Medicare case approvals were rendered without a hearing in the Chicago region. The data we obtained from OHA show that in fiscal year 1989, there were 1,042 Medicare part A decisions made without a hearing in Chicago. This was about one-fourth of the total on the record decisions nationwide. The nationwide approval rates for decisions without a hearing was 77 percent. The rate for Chicago cases was 95 percent. We have requested and are waiting for additional information from the Office of Hearings and Appeals that will enable us to provide more details about what the Chicago part A cases were and a little more workload information.

We will keep you apprised of our progress on that.

The final two questions, 5 and 6, asked us what proportion of the Chicago Medicare cases done without a hearing were handled by a regional chief judge and how his cases were proportioned to the regional cases. In summary the regional chief judge decided 836 Medicare part A cases in fiscal 1989. The data currently are not available to show how many of those decisions were done with or without a hearing for the total time.

We do have the first 9 months of calendar 1989, which shows out of 613 part A cases decided by the chief judge, there were 162 hearings that were held or 26 percent. We inquired in Chicago with the region 5 office manager about the allocation of the 836 decisions rendered by the chief judge and how they were allocated to the field offices. Her response was that it was a management judgment on her part and also her knowledge of the work that each of the field offices had contributed to the completion of case work.

In this regard what she was referring to had to do with the staff work that went into the office because work for administrative support, staff attorneys and decision writers was essentially pooled across the region. A case could be worked in a variety of different offices. Here allocation of those cases was based on her understanding of where the work had been done.

When you look at the two tables that deal with the hearing offices within the Chicago region and where cases were allocated you will see they were allocated across the number of hearing offices. There were some offices where cases were not allocated. The largest number were allocated to the Chicago downtown office. There is a comparison in our letter that will show you the average disposition per ALJ in those offices with those decisions included and without those decisions included. On the first of those two charts it will show you, if you rank ordered the 19 offices within the region,

what the ranking was before those decisions were allocated and after those decisions were allocated.

In summary, I would say there was some movement but very little in the rank ordering. You can see the impact of the allocation on the total statistics for the monthly average ALJ disposition for each of those offices. When the cases are allocated, they are allocated to the office. The chief judge or a retired judge in either case does not count against the manpower or the staffing in that particular office.

If you take the total number of cases, as has been alluded to here and divide that by the number of judges assigned to that office it would raise that number. In each of these instances you will see the number has been raised. The amount the numbers were raised when looking at the total dispositions across the offices is not again a significant number. For example, the largest movement in terms of average monthly dispositions was again in the Chicago downtown office where there were 267 of the chief judge's cases allocated. The movement was from an average of 27 to just slightly over 31 cases per month as the average dispositions per ALJ in that offices. Cases are not allocated to individual ALJs, they are allocated to the office as a whole. So an individual judge would not have his or her statistics changed. It would be the office that would be changed in this instance.

I would like to note something I have just noted on table 6 that we have in the letter. There is a column heading on case dispositions that is incorrect in that the hearings for the largest number—in the first column—should be total dispositions as opposed to chief judges dispositions. Each of those column headings should be moved one to the right. We will provide you a corrected copy of that chart for the record.

Chairman JACOBS. When that corrected copy arrives, it will be made a part of the record together with the summary you have given us.

[The information follows:]

ANDY JACOBS, JR., INDIANA, CHAIRMAN
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COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES

WASHINGTON, DC 20515

SUBCOMMITTEE ON SOCIAL SECURITY

March 20, 1990

The Honorable Charles A. Bowsher
Comptroller General of the United States
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Bowsher:

The Ways and Means Social Security Subcommittee plans hearings on the activities of ALJs and the appeals process.

In connection with those hearings we would appreciate it if you could provide us with some information with regard to the following questions:

1. We would like see statistics showing what portion of medicare appeals were decided by the Office of Hearings and Appeals without hearings and only by reading the records of the cases last year.

2. We would like to know what general categories, if any, such appeal decisions fall into.

3. To what extent did retired ALJs participate in such decisions?

4. How many approvals based on the record only involved the Chicago region?

5. What portion of these appeals were approved by the present chief ALJ, Theodore Hanes?

6. How were Judge Hanes's decisions apportioned among OHA offices for productivity calculations?

7. To what extent did the decisions made by reading the record alone appear to be accurate and meet the requirements of law?

Thank you for your kind attention.

Sincerely,

Andy Jacobs, Jr.
Chairman

AJ/fw

cc: The Honorable Gwendolyn S. King
Commissioner of Social Security
Social Security Administration
Room 900 Altmeyer
6401 Security Boulevard
Baltimore, Maryland 21235

GAO
United States
General Accounting Office
Washington, D.C. 20548

Human Resources Division

June 13, 1990

The Honorable Andrew Jacobs, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

Dear Mr. Chairman:

This letter responds to your March 20, 1990, request that we answer six questions concerning Medicare appeals decided by administrative law judges (ALJs) of the Social Security Administration (SSA). Our review is continuing. However, as requested by your office, we are providing preliminary data we have obtained to date.

Individuals and medical care providers whose claims for benefits under either Part A or Part B of the Medicare program have been denied may appeal the denial to an ALJ. Medicare appeals have been a small, but increasing workload for ALJs, over the past decade. The number of cases filed increased from 2,800 in 1980 to 20,975 in 1989, and such cases currently make up 7 percent of the overall ALJ workload. Ninety-six percent of these cases involved appeals of decisions under Part A, which pays for services provided by hospitals, skilled nursing facilities, and home health care agencies.

The following is a brief summary of your questions and the data we have obtained to date. The data in this letter were obtained from SSA's Office of Hearings and Appeals (OHA) management information systems, and we have not verified the data's accuracy. All the data cover fiscal year 1989, unless otherwise stated.

In your first two questions you asked for statistics showing what portion of Medicare appeals were decided by ALJs "on the record" (that is, without a hearing) and what general categories, if any, such appeal decisions fell into.

Claimants are entitled to a hearing unless they request that no hearing be held or the ALJ determines that the record contains enough information to rule in their favor. About one-fourth of Medicare Part A decisions in fiscal year 1989 were made without a hearing. Table 1 shows the number of Part A decisions rendered in each region and the percentage for which no hearings were held.

Table 1: Percentage of Medicare Part A Decisions Without Hearings

Regions	Total decisions	Decisions without a hearing	No hearings (Percent)
Boston	969	372	38
New York	1,654	900	54
Philadelphia	3,171	151	05
Atlanta	3,178	754	24
Chicago	2,376	1,042	44
Dallas	1,007	241	24
Kansas City	624	180	29
Denver	126	4	03
San Francisco	465	128	28
Seattle	130	49	38
National	13,700	3,821	28

Source: OHA Management Information Systems (fiscal Year 1989).

There is no significant difference between the rates at which claimants' Part A appeals were granted after a hearing and in cases for which no hearing was held. In fiscal year 1989, ALJs approved 82 percent of all Part A cases decided. When a hearing was held, 83 percent of the decisions favored the claimant. Table 2 shows the percentage of all Part A decisions approved, along with the percentage approved after a hearing and without a hearing in each region.

Table 2: Medicare Part A Decisions Approved

Regions	Total decisions	Percentage approved	Decisions with a hearing	Percentage approved	Decisions without a hearing	Percentage approved
Boston	969	85	597	84	372	87
New York	1,654	58	754	73	900	46
Philadelphia	3,171	92	3,020	92	151	91
Atlanta	3,178	78	2,424	77	754	81
Chicago	2,376	88	1,334	82	1,042	95
Dallas	1,007	86	766	86	241	85
Kansas City	624	77	444	74	180	87
Denver	126	88	122	88	4	100
San Francisco	465	77	337	73	128	88
Seattle	130	78	81	73	49	92
National	13,700	82	9,879	83	3,821	77

Source: OHA Management Information Systems (fiscal Year 1989).

ALJs decided 421 Medicare Part B cases in fiscal year 1989 and approved 41 percent of them. Ninety-six of the decisions (23 percent) were decided without a hearing. The approval rate was 31 percent when no hearing was held and 44 percent when a hearing was held. All Part B decisions in fiscal year 1989 were handled through the Medical Development Center.

Medicare cases (both Parts A and B) made up about 6 percent of the ALJs' overall completed caseload in fiscal year 1989. The percentage of Medicare dispositions to all program dispositions varied among regions from 14 percent in Boston to 2 percent in Denver, San Francisco, and Seattle, as shown in table 3.

Table 3: Percentage of Medicare Dispositions to Total Dispositions

Regions	Total dispositions (all programs)	Medicare dispositions	Percentage of Medicare to total
Boston	9,481	1,330	14
New York	38,239	1,965	05
Philadelphia	32,079	3,541	11
Atlanta	67,075	3,916	06
Chicago	51,952	3,122	06
Dallas	38,202	1,168	03
Kansas City	14,390	977	07
Denver	7,213	171	02
San Francisco	34,829	633	02
Seattle	8,058	177	02
National	301,518	17,000	06

Source: OHA Management Information Systems.

Note: Excludes Medicare Development Center.

Your third question asked us to determine the extent to which retired ALJs participated in Medicare decisions. In fiscal year 1989, SSA used five senior, retired ALJs to decide Medicare and/or Title II (disability) cases to help alleviate case backlogs in four regions. In fiscal year 1989, these retired ALJs rendered a total of 6 Medicare decisions and 873 disability decisions. The impact of retired ALJs on regional dispositions was minimal, as shown on table 4.

Table 4: Impact of Retired ALJs on Regional Dispositions

Regions	Total dispositions	Retired ALJ dispositions	Percentage of retired to total
Chicago	51,952	625	Ø1
Philadelphia	32,Ø79	182	Ø1
Dallas	38,2Ø2	15	<Ø1
San Francisco	34,829	57	<Ø1

Source: OHA Management Information Systems (fiscal Year 1989).

Your fourth question asked us to determine how many Medicare case approvals rendered without a hearing involved the Chicago Region. Data obtained from the OHA show that, in fiscal year 1989, 1,Ø42 Medicare Part A decisions were made without a hearing in Chicago. This was about one-fourth of 3,821 total decisions rendered on the record nationwide during the period. The nationwide approval rate for decisions rendered without a hearing was 77 percent. The rate for Chicago cases was 95 percent. We are obtaining information from OHA that will enable us to provide more details about the Chicago Part A workload, but that information is not yet available.

Your final two questions asked what portion of the Chicago Medicare appeal cases done without a hearing were handled by the Regional Chief Judge and how were his dispositions apportioned among the field offices in Region V. Data for fiscal year 1989 showed that the Chief Judge decided 836 Medicare Part A cases. Data are currently not available to show how many of these decisions were done with and without a hearing. However, data for the first nine months of 1989 showed that out of 631 Part A cases decided by the Chief Judge, hearings were held in 162 (26 percent).

According to the Region V Office Manager, the 836 decisions rendered by the Chief Judge were allocated to field offices based on her management judgment and her knowledge of how much work each field office contributed to the completion of the case work.[1] Dispositions rendered by chief judges and retired judges are counted in the dispositions of the offices they are

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[1]Case work performed by the field offices for these cases included work by staff attorneys and decision writers as well as clerical support.

assigned to; however, the judge is not counted when an office average per ALJ is calculated. Since only dispositions are counted, an office's average number of dispositions per ALJ would be affected by the allocation of cases to a particular field office. Tables 5 and 6 show the impact that decisions rendered by the Chief Judge and by retired judges and allocated to specific field offices in Region V had on those offices' workload statistics. In each instance the overall impact was small, and the relative ranking of each office within the region did not change significantly. Allocating decisions made by the Chief Judge to a field office did not affect the performance statistics of individual ALJs assigned to that office.

Table 5: Impact of the Regional Chief Judge and Retired Judges on Office Dispositions

Hearing offices	Total dispositions	Chief Judge's cases allocated	Retired judges cases	Ranking before and after Chief Judge's & retired judges' allocation	
				Before	After
Chicago (DT)	3,686	267	209	19	18
Chicago (S)	2,919	0	0	13	14
Chicago (W)	2,847	68	0	05	06
Cincinnati	2,065	0	54	16	16
Cleveland	5,551	6	2	07	08
Columbus	2,861	120	0	14	12
Dayton	1,690	0	0	01	01
Detroit	3,422	54	0	12	13
Evanston	2,501	105	247	06	04
Evansville	1,712	0	0	02	03
Flint	1,606	0	0	18	19
Ft. Wayne	1,307	0	0	17	17
Grand Rapids	2,089	0	0	08	10
Indianapolis	3,707	74	0	09	07
Lansing	1,543	19	0	15	15
Milwaukee	4,230	0	0	04	05
Minneapolis	2,696	19	0	10	11
Oak Park	3,412	26	113	11	09
Peoria	2,387	78	0	03	02

Source: OHA Management Information Systems (fiscal Year 1989).

Note: Hearing office ranking was computed based on total dispositions and work-years used.

Table 6: Impact of Cases Allocated From the Regional Chief Judge and Retired Judges on Average Monthly ALJ Dispositions for Specific Offices

Hearing office	Total dispositions	Chief judges' cases allocated	Retired judges' cases allocated	Monthly average ALJ disposition	
				With decisions	Without decisions
Chicago (DT)	3,686	267	209	31.24	27.21
Chicago (S)[a]	2,919	0	0	30.41	30.41
Chicago (W)	2,847	68	0	39.54	38.59
Cincinnati	2,065	0	54	30.40	29.61
Cleveland	5,551	6	2	37.27	37.22
Columbus	2,861	120	0	34.05	32.63
Dayton[a]	1,690	0	0	40.24	40.24
Detroit	3,422	54	0	34.23	33.69
Evanston	2,501	105	247	39.69	34.11
Evansville[a]	1,712	0	0	35.66	35.66
Flint[a]	1,606	0	0	33.45	33.45
Ft. Wayne[a]	1,307	0	0	36.30	36.30
Grand Rapids[a]	2,089	0	0	41.44	41.44
Indianapolis	3,707	74	0	30.89	30.27
Lansing	1,543	19	0	25.71	25.40
Milwaukee[a]	4,230	0	0	35.25	35.25
Minneapolis	2,696	19	0	32.09	31.86
Oak Park	3,412	26	113	35.54	34.09
Peoria	2,387	78	0	35.14	33.99

Source: OHA Management Information Systems (fiscal Year 1989).

[a]Hearing offices not affected by the allocation of cases.

As arranged with your office, we will keep you apprised of our progress as we continue work on this request. If you have any questions, please feel free to call me on (202) 275-5365.

Sincerely yours,

Gregory J. McDonald
Associate Director,
Income Security Issues

Chairman JACOBS. Mr. McDonald, we appreciate your waiting to give this additional information.

Are there any comments from the panel?

Mr. SPRAGUE. Yes, Mr. Chairman. This investigation is totally inadequate. I will just concentrate on region 5 because I don't know what the other regions are doing. What they are going to have to do if they are going to do it right is to find out what specific offices got the retired judges and Haynes' cases and then go month by month because it is the average disposition per ALJ that everything is centered on as far as that office getting equipment, promotions, and awards.

Whoever does it, if they want to do it right, rather than throwing out a bunch of jumbled figures and say that is minimal—I know it is not minimal in region 5 and I will challenge that.

Chairman JACOBS. We don't have to challenge. What do you think about taking the investigation further as Judge Sprague suggested?

Mr. MCDONALD. We are going further. The work is continuing. I would like you to view this as a progress report as I have stated in the letter. We have discussed with staff and will continue to go behind the numbers.

Chairman JACOBS. Are you saying that you will look into it in the method in which Judge Sprague has suggested?

Mr. MCDONALD. We have been looking into it very closely to the method Judge Sprague is suggesting.

Chairman JACOBS. It might be fair to say rather than inadequate, incomplete at this point.

Mr. MCDONALD. I encourage you to view these numbers as incomplete at this time. The numbers reflect the work that we have done to date. I would not say that is inadequate.

Mr. SPRAGUE. If I could point something out, I have the figures for the downtown office, there were nine ALJs in February 1989. There were 286 dispositions. That comes to about 28 for that month. The region has it as 33 because they did not count Judge Haynes who would have been the 10th judge. From 33 to 28.6, when we read those figures, that is quite a bit.

March of 1989, 404 dispositions which would come to 40.4, regional figures without Haynes, 47, those are big numbers. April, 289. With Haynes it would have been 28.9, without 33. These are big numbers. May, 317 which would have been 31.7 versus 36. We are not talking small potatoes in region 5.

In November 1989, two retired judges did the dispositions. I am not complaining about allocating these dispositions, at least the retired judges if they did the Chicago downtown cases, downtown could get credit if they were not counted but they were not counted. It is the same with Judge Haynes' dispositions although I don't think they can willy-nilly build up false impressions of offices, in whatever way they want to build the figures up.

For November 1989, with the two retired judges counted, the average should have been 30. The regional average by not counting them was 37. It just happens to make the magic number. Evanston was grossly inflated by retired judges. That is how it was caught there. This was kept under wraps. It was false. It was fraud. I think inflating significant numbers like this when everything depends upon it is more than just false. It shows intent in my opinion. They were always in the 20s and 30s. But after the retired judges, the average was 49.7 for May of 1989. They were looking at each other saying how many did you turn out. They did it for 4, 5, or 6 months.

They are doing it now in Chicago west on part B cases, grossly inflating their averages since October of 1989. It is in my statement right through the present date. They are crediting another ALJ in that office with 70 or 80 cases on part B. The office's average in the region is 50 when it should be in the 30s. So it is grossly inflated. You can go on, if you will give me the figures, I will show you how the average dispositions were inflated in all the favorite offices in the region.

If it is a national scheme, he should find out. I don't know.

Mr. MCDONALD. I would stop short of any characterization of the numbers. I will say that we will look at the numbers, that is your request. Certainly, we will do it in a fair and objective manner.

Chairman JACOBS. Thomas Moore says, "I have no window to look into another mind."

Mr. SPRAGUE. We have flesh and blood witnesses that the Lansing office gave to the IG in November 1989. Not one have been interviewed. This is where you will determine it. Talk to Ken Paulini, talk to Jim Horn in Chicago west. Talk to Judge Drucker here. We have been waiting by the phone for someone to talk to us.

Chairman JACOBS. Here I thought you were busy doing cases.

Mr. SPRAGUE. Frankly, I am doing both. I am doing it on the weekends, making phone calls on the weekends. Yes, in a sense I am doing both.

Chairman JACOBS. I know your feeling.

Mr. SPRAGUE. Mara-Lyn Roberts from Evanston will tell you. Jim Drezwicki will tell you. Jonas from that office will tell you. It is well known in the region. If that is not bad arithmetic, something is wrong. It is all for personal greed. They get paid for the average in the office, the region and the Nation. For the national figures, it may not have much of an impact. As you put those numbers into the region, that created false impression. If you use those numbers and compile them nationally, they are not accurate.

Chairman JACOBS. I think you have made your point.

Mr. MCDONALD. We will look at Judge Sprague's statement. We have been in the Lansing and Chicago office and will be again.

Chairman JACOBS. Fine.

Mr. MCDONALD. If I could do one thing for the record, to clarify some points that have come up to this point. There has been a lot of discussion about the Administrative Procedure Act and goals and quotas and items of this nature and whether they are permitted or not permitted.

As part of doing our December 1989 report to you we did take a fairly extensive look at the Administrative Procedure Act and the specific procedures the SSA was involved with in terms of performance goals. While each case has to be taken on its merits as an individual case, our legal people do not believe there is anything improper in the context of the Administrative Procedure Act, about the way the Social Security Administration, has set or used the goals as we know them, up to the point of our report.

We have looked at the *Nash* case and the body of legal evidence that goes behind it. While you would have to take individual cases, case-by-case, we believe there is nothing on the face of it wrong with what the Social Security Administration has been doing up to this point.

[Additional information follows:]

GAO

United States
General Accounting Office
Washington, D.C. 20548

JUN 28 1990

Human Resources Division

June 27, 1990

The Honorable Andrew Jacobs, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
House of Representatives

Dear Mr. Chairman:

During the Subcommittee's June 13th hearing regarding administrative law judges (ALJs), two questions arose: Whether the Social Security Administration (SSA) may establish performance goals for ALJs, and to what extent, if any, such goals improperly interfere with the ALJs' statutory independence. Other administrative practices instituted by SSA to expedite case adjudication were also discussed. In particular, different views were expressed concerning the decision in a suit by an ALJ against SSA, Nash v. Bowen, 869 F.2d 675 (2d Cir. 1989), cert. denied, 110 S. Ct. 59 (1989). As requested by your office, we are providing a discussion of Nash in support of the views we presented in testimony. (A copy of the decision is enclosed.)

In the Nash case, the Court of Appeals for the Second Circuit upheld a district court decision that actions of the Secretary of Health and Human Services that were intended to improve the hearing system and eliminate a large backlog of cases did not improperly infringe on the decisional independence of SSA's ALJs. The suit was brought by Simon Nash, an SSA ALJ, who challenged, among other things, SSA's imposition of (1) a "Peer Review Program," in which SSA's Office of Hearings and Appeals was directed to review ALJ decisions outside the usual appeals procedure; (2) an allegedly arbitrary monthly production quota system for ALJs; and (3) a "Quality Assurance System," which allegedly attempted to control the number of ALJ decisions reversing previous state-level determinations not to award benefits.

In reviewing the Peer Review Program, the district court had found that it was intended to be, and operated as, a legitimate quality control measure. Relying on this determination, and stating that "policies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged," the court of appeals upheld the lower court's decision on this point. (See page 680 of decision).

Concerning the second allegation, the district court had found that SSA's case production expectations were not "etched in stone" and, therefore, constituted goals and not quotas. Further, the court concluded that the goals were reasonable and did not interfere with ALJs' decisional independence because the judges were not directed how, or how quickly, to decide a particular case. The court of appeals agreed and added:

> "In view of the significant backlog of cases, it was not unreasonable to expect ALJs to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required no less." (See pages 680-681).

Finally, in examining SSA's "Quality Assurance System, "the district court had found that there was no direct pressure on ALJs to maintain a fixed percentage of reversals and dismissed this claim also. The court of appeals, although finding "cause for concern" in this system, upheld the district court decision. The evidence showed that, while SSA focused on the number of reversals by an ALJ, it did so not to impose arbitrarily a reduction of reversal rates, but as part of a statistical analysis showing a connection between reversal rates and errors in decisions. In other words, the reversal rate was used as a measure of quality and consistency. (See page 681).

The court expressed some concern from a policy standpoint about the soundness of the practice of using reversal rates, but made clear that the practice was legal:

> "The bottom line in this case is that it was entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decisionmaking process." (See page 681).

If you would like to further discuss this case or related issues, please call Julian Klazkin, of our Office of General Counsel, at 275-5212.

Sincerely yours,

Gregory J. McDonald
Associate Director
Income Security Issues

Enclosure

Simon NASH, Plaintiff-Appellant,

v.

Otis R. BOWEN, John A. Svahn, Donald J. Devine, Louis B. Hays, Philip T. Brown, and L. Charles Leonard, Defendants-Appellees.

No. 586, Docket 88-6066.

United States Court of Appeals,
Second Circuit.

Argued Dec. 20, 1988.

Decided March 7, 1989.

Administrative law judge brought action to challenge steps taken by the Secretary of Health and Human Services to improve the quality and efficiency of the work of administrative law judges. The United District Court for the Western District of New York, John T. Elfvin, Senior District Judge, held that judge lacked standing to challenge Secretary's policy of nonacquiescence in decisions of federal courts other than the Supreme Court, and found for defendants on the other claims. Judge appealed. The Court of Appeals, Altimari, Circuit Judge, held that: (1) judge lacked standing to challenge the nonacquiescence policy, and (2) the steps taken by the Secretary did not improperly impair any right to decisional independence under the Administrative Procedure Act.

Affirmed.

1. Federal Civil Procedure ⇐103.2

Social Security Administration Administrative Law Judge lacked standing to challenge Administration's policy of nonacquiescence in decisions of federal courts other than Supreme Court; only adverse consequence for judge resulting from nonacquiescence was that his decisions were subject to reversal by Secretary of Health and Human Services.

2. Administrative Law and Procedure ⇐479

Social Security and Public Welfare ⇐142.5

Steps taken by Secretary of Health and Human Services, including imposition

of allegedly arbitrary monthly production quotas and attempt to control number of administrative law judge (ALJ) decisions reversing previous state level determinations declining to award benefits, did not improperly impair any right to decisonal independence of ALJs under Administrative Procedure Act; reasonable effort to increase ALJ production levels did not infringe on decisional independence, and reversal rate policy was in fact an effort to locate errors in decision making rather than to actually reduce reversal rates. Social Security Administration Regulations, § 404.900 et seq., 42 U.S.C.A. App.; 5 U.S.C.A. §§ 556(b)(3), 3105, 4301(2)(D); Social Security Act, §§ 205, 205(a, b), 221, as amended, 42 U.S.C.A. §§ 405, 405(a, b), 421.

Simon Nash, Buffalo, N.Y., plaintiff-appellant pro se.

Stephen J. Markman, Ass't. Atty. Gen., Washington, D.C. (Wilfred R. Caron, Sr. Counsel, William G. Laffer III, Office of Legal Policy, U.S. Dep't of Justice, Washington, D.C., of counsel), for defendants-appellees.

Irving Kator, Joseph B. Scott, Jennifer R. Levin, Kator, Scott & Heller, Washington, D.C., for Federal Administrative Law Judges Conference and Ass'n of Administrative Law Judges, amici curiae, on behalf of plaintiff-appellant.

Anthony Szczygiel, Ass't Professor, Legal Assistance Program, State University of New York at Buffalo Law School, Buffalo, N.Y., amicus curiae, on behalf of plaintiff-appellant.

Before FEINBERG, NEWMAN and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

The principal issue raised by the instant appeal following a nonjury trial in the United States District Court for the Western District of New York (Elfvin, J.) is whether efforts by the Secretary of Health and Human Services (the "Secretary") to improve the quality and efficiency of the work of Administrative Law Judges ("ALJs") impaired their asserted right to "decisional independence" under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (the "APA"). In addition, we are asked to decide whether plaintiff-appellant, an ALJ with the Social Security Administration, has standing to challenge the Secretary's policy of non-acquiescence in decisions of federal courts other than the Supreme Court. Because the district court's factual findings underlying the conclusion that the Secretary's policies did not exceed the bounds of legitimate agency supervision are fairly supported by the record and therefore are not clearly erroneous, we agree with the district court that the Secretary's practices did not infringe on the decisional independence of ALJs. We also find that the district court correctly granted summary judgment in favor of defendants-appellees on plaintiff-appellant's non-acquiescence claim for lack of standing and therefore affirm the district court's judgment in all respects.

BACKGROUND

Plaintiff-appellant, *pro se*, Simon Nash is an Administrative Law Judge ("ALJ") with some thirty years experience in the Social Security Administration. In 1967, he became an ALJ in charge ("ALJIC") of the Buffalo, New York field office of hearings and appeals. By 1975, the Social Security Administration (the "agency") was faced with an administrative crisis due to a backlog of over 100,000 cases. In order to eliminate the backlog and the concomitant delays in processing appeals, former director of the Bureau (now "Office") of Hearings and Appeals Robert L. Trachtenberg instituted a series of reforms which appellant contends interfered with the "decisional independence" of ALJs under the APA, the Social Security Act and the due process clause of the fifth amendment. Nash initially protested the new policies within the agency only to be summarily demoted from his position as ALJIC to ALJ. In his original complaint filed May 30, 1978 in the district court, plaintiff alleged, in addition to a claim concerning his demotion which was later dropped, that the

Secretary's newly-instituted "Peer Review Program," monthly production goals, and "Quality Assurance System" infringed upon the "quasi-judicial" status of ALJs. *Nash v. Califano*, 613 F.2d 10, 13 (2d Cir. 1980) ("*Nash I*"); *see Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 130, 73 S.Ct. 570, 572, 97 L.Ed. 872 (1953).

On June 4, 1979, plaintiff's claims were dismissed by the district court for lack of standing. This court reversed on January 7, 1980 in an opinion by then Chief Judge Kaufman, *Nash I*, 613 F.2d 10, and remanded the case to the district court for further consideration. We held that the "alleged inroads on ALJs' decisional independence [was] arguably within the zone of interests protected by the [APA] and Social Security Act." *Id.* at 14; *see Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). This court also noted in *dicta* that the APA confers a "special status" on ALJs, protecting them from agency interference and giving them a "qualified right" of decisional independence. 613 F.2d at 15–16; *see Ramspeck*, 345 U.S. at 132–33, 73 S.Ct. at 573.

Following remand to the district court, plaintiff filed an amended complaint, dated September 29, 1982, which realleged the above claims seeking declaratory relief and added a new claim which attacked the legality of the agency's non-acquiescence policy. On May 29, 1985, the district court dismissed plaintiff's non-acquiescence claim for lack of standing and set the remaining claims for trial. At that time, the district court also considered defendants' contention that this court's decision in *Nash I*—while resolving the question of plaintiff's standing to maintain his remaining claims under the APA—did not preclude dismissal of those claims inasmuch as neither the APA nor any other federal statute expressly or impliedly creates a private right of action in plaintiff's favor. The district court rejected this argument and instead interpreted *Nash I* as construing the APA to provide plaintiff a right of action to advance his decisional independence claims. *But see Goodman v. Svahn*, 614 F.Supp. 726, 729 n. 3 (D.D.C.1985); *cf. Association of ALJs, Inc. v. Heckler*, 594 F.Supp. 1132, 1140–41 (D.D.C.1984). The case thus proceeded to trial before Judge Elfvin in 1985–86, and following trial the matter was submitted for decision. On January 6, 1988, the district court filed its memorandum decision and order finding in favor of defendants, and judgment thereafter was entered dismissing all of plaintiff's claims.

DISCUSSION

I.

[1] We address plaintiff's non-acquiescence claim first. As the district court correctly recognized, plaintiff was unable to demonstrate the requisite " 'distinct and palpable' " injury, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)), arising from the challenged practice such that he "personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508, 95 S.Ct. at 2210; *see Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). The only adverse consequence for Nash resulting from nonacquiescence is that his decisions are subject to reversal by the Secretary. This court previously has considered the Secretary's *de facto* policy of non-acquiescence in the law of the circuit concerning the "treating physician" rule, but only in the context of adjudicating the rights of *claimants* to Social Security benefits. *See, e.g., Stieberger v. Bowen*, 801 F.2d 29 (2d Cir.1986); *Schisler v. Heckler*, 787 F.2d 76 (2d Cir.1986). At least one other circuit court has rejected ALJ standing to challenge the merits of a policy instruction to ALJs when a claimant-initiated proceeding seeking review of the administrative denial of social security benefits is available. *See D'Amico v. Schweiker*, 698 F.2d 903, 906 (7th Cir.1983).

Indeed, "[t]hat route is preferable to a suit by administrative law judges, who are the umpires between claimants to social security benefits and the Social Security Administration." *Id.* We thus agree with the district court that Nash lacks standing to pursue a non-acquiescence claim against the Secretary.

II.

[2] Turning, then, to plaintiff's "decisional independence" claims, the challenged practices are threefold. As explained in *Nash I*, familiarity with which is assumed, the first allegedly unlawful practice is the "Peer Review Program" (a/k/a the "Appellate Appraisal System,") which directed the Office of Hearings and Appeals to review decisions of ALJs outside of the usual appeals procedure conducted by the Appeals Council. 42 U.S.C. §§ 405, 421; 20 C.F.R. § 404.900 *et seq.*; *cf.* 5 U.S.C. §§ 556(b)(3), 3105 (vesting ALJs with power to conduct administrative hearings). The second practice concerns the imposition of allegedly arbitrary monthly production quotas requiring ALJs to render a specified number of decisions per month. *Cf.* 5 U.S.C. § 4301(2)(D) (exempting ALJs from performance appraisals); 5 C.F.R. § 930.211 (same). The third alleged threat to ALJs' decisional independence is the "Quality Assurance System," which attempted to control the number of ALJ decisions reversing previous state-level determinations declining to award benefits. *See generally Nash I*, 613 F.2d at 13.

A.

Preliminarily, we address two procedural arguments raised by defendants on this appeal. According to defendants, plaintiff's generalized attacks on the agency are "fundamental[ly] flaw[ed]" in that they do not state a cause of action under the APA or any other federal statute. Defendants point to the D.C. Circuit's in banc decision in *Council of and for the Blind of Delaware County Valley, Inc. v. Regan*, 709 F.2d 1521, 1524–25 (D.C.Cir.1983) as support for the proposition that although we previously have decided in favor of plaintiff on the question of standing, *Nash I*, 613 F.2d at 16–17, this court is not thereby precluded now from holding that plaintiff has no private right of action to maintain his suit. *Cf. Goodman v. Svahn*, 614 F.Supp. 726, 729 n. 3 (D.D.C.1985). Relying on *dicta* from *Nash I* that the APA "confer[s] a qualified right of decisional independence upon ALJs," 613 F.2d at 15, the district court declined to examine the sufficiency of Nash's claims and proceeded directly to the merits. Defendants in effect argue that the district court was not bound by *dicta* in *Nash I* and should have dismissed plaintiff's causes of action for failure to state claims upon which relief could be granted. *See* Fed.R.Civ.P. 12(b)(6).

While we agree *Nash I* stands only for the narrow premise that plaintiff has standing to pursue his claims, we see no need to decide in this case whether the APA confers, expressly or by implication, protection for the decisional independence of ALJs since the district court rejected Nash's claims on their merits.. We should add, however, that it is not clear whether the APA provides such protection aside from the tenure, compensation, and performance appraisal exemption provisions under the APA that give life to the "quasi-judicial" status of ALJs. *See Goodman*, 614 F.Supp. at 728; *cf.* 5 U.S.C. § 7521(a) (protecting ALJs from agency disciplinary action except for "good cause established and determined by the Merit Systems Protection Board ... after opportunity for hearing before the Board"); *id.* § 1205(a)(1) (empowering Merit Systems Protection Board to hear and adjudicate disputes under APA, including whether an ALJ has been subjected to "prohibited personnel practice" under 5 U.S.C. § 1206(a)(1)); *Brennan v. HHS*, 787 F.2d 1559 (Fed.Cir.), *cert. denied*, 479 U.S. 985, 107 S.Ct. 573, 93 L.Ed.2d 577 (1986) (adjudicating ALJ decisional independence claim in context of appeal from decision of Merit Systems Protection Board disciplining ALJ under 5 U.S.C. § 7521). In any event, given the present posture of this case, we

decline to assess the legal sufficiency of Nash's claims.

Defendants' other procedural objection concerns the preclusive effect of a prior judgment in favor of the Secretary in *Association of ALJs v. Heckler*, 594 F.Supp. 1132 (D.D.C.1984). The Department of Justice contends that the *Association* case is *res judicata* on the merits of at least two of Nash's decisional independence claims. The complaint in the *Association* case constituted a broad challenge to various practices of the Secretary substantially identical to those advanced by plaintiff in this case. The Association specifically alleged that the Secretary had infringed upon the decisional independence of ALJs through policies and practices designed to monitor the decisions of ALJs and "pressure [them] into disposing of ... larger numbers of cases each year" and "into deciding fewer cases in favor of claimants." Complaint ¶ 18; *see* 594 F.Supp. at 1135–36. The record in this case indicates that Nash is a member of the Association, that he consulted with the Association's counsel about the D.C. district court litigation, and that he shared certain documents with the Association for use in its case. App. at 437–39.

We are inclined, therefore, to agree with defendants that the decision of the district court, at least with regard to the "Peer Review Program" and the "Quality Assurance System," may be affirmed as *res judicata* on the judgment in *Association of ALJs v. Heckler*. Although the district court did not rule on this point, it would seem that we are not precluded from doing so. *See American Furniture Co. v. International Accommodations Supply*, 721 F.2d 476, 482 (5th Cir. Unit A 1981); *Robertson v. Interstate Securities Co.*, 435 F.2d 784, 787 n. 4 (8th Cir.1971); *see also Dandridge v. Williams*, 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 1156–57 n. 6, 25 L.Ed.2d 491 (1970); *but cf. Savings & Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1039 n. 3 (7th Cir.1983) (unless pleaded or otherwise properly raised at trial, *res judicata* defense is waived); *Nevada Power Co. v. Watt*, 711 F.2d 918, 932–33 (10th Cir.1983) (same).

On the question of *res judicata*, plaintiff argues only that his claims are separate and distinct from those decided in *Association of ALJs*. He attempts to couch the decisional independence claims raised by the *Association* case in terms of the now-discontinued "Bellmon Review Program," which was instituted under the authority of section 304(g) (the "Bellmon Amendment") of the Social Security Disability Amendments Act of 1980, Pub.L. No. 96–265, 94 Stat. 441, 456 (1980). *See Association of ALJs*, 594 F.Supp. at 1133; *see also W.C. v. Bowen*, 807 F.2d 1502, 1503–05 (9th Cir. 1987) (explaining reasons for demise of "Bellmon Review Program"), *modified*, 819 F.2d 237 (9th Cir.1987). However, the fact that the "Bellmon Review Program" is no longer in existence does not make the legal issue moot. *See Association of ALJs*, 594 F.Supp. at 1141. Indeed, the challenged practices in *this* case also appear to have ceased; but because they are "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310 (1911), there remains a live controversy between the parties to be resolved. *See Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982). The point is that the "Bellmon Review Program" is for all intents and purposes the same as the "Quality Assurance System" considered herein, i.e., the targeting and pressuring of ALJs with high allowance of benefit rates (a/k/a "reversal" rates) to fall into line or be subjected to disciplinary action. Plaintiff's other claims were either raised in the *Association* case ("Peer Review Program" claim), or could have been raised (monthly production goals claim) in that action. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414–15, 66 L.Ed.2d 308 (1980). In sum, Nash appears to have had a full and fair opportunity to be heard in that case.

Notwithstanding the very substantial, if not dispositive, arguments in favor of application of the rule of *res judicata* in the instant case, we nonetheless feel obliged to reach the merits of Nash's claims in view of our strong intimation in *Nash I* that plaintiff was entitled to a plenary trial.

613 F.2d at 17. Accordingly, we proceed to a consideration of the dismissal by the district court of plaintiff's decisional independence claims on their merits.

B.

The district court explicitly determined that "[a]lthough the defendants may have engaged in some questionable practices which clearly caused great unrest among ALJs, ... they did not infringe on the decisional independence of ALJs." The factual components of this conclusion, as with all findings of fact, cannot be set aside on appeal unless they are clearly erroneous. Fed.R.Civ.P. 52(a).

The district court held that the "Peer Review Program" was intended to respond to the "wide disparity in legal and factual determinations among ALJs." Judge Elfvin concluded that various peer review actions constituted "legitimate administrative steps undertaken to enhance the quality and efficiency of the hearing system." *Cf. Heckler v. Campbell*, 461 U.S. 458, 466–67, 103 S.Ct. 1952, 1956–57, 76 L.Ed.2d 66 (1983). Policies designed to insure a reasonable degree of uniformity among ALJ decisions are not only within the bounds of legitimate agency supervision but are to be encouraged. *See Santise v. Schweiker*, 676 F.2d 925, 930–31 (3d Cir.1982), *cert. denied*, 461 U.S. 911, 103 S.Ct. 1889, 77 L.Ed.2d 280 (1983); *see generally* Scalia, *The ALJ Fiasco—A Reprise*, 47 U.Chi.L. Rev. 57 (1979). In this case, "extra-appellate" review of "dead" cases aimed at improving the quality of ALJ decisionmaking is entirely consistent with the prerogative of the agency which retains "all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). It is, after all, the Secretary who ultimately is authorized to make final decisions in benefit cases. *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir.1984); *cf.* 42 U.S.C. § 405(1) (authorizing Secretary to delegate *his* statutory powers to "any member, officer, or employee" of the agency). An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law. *Mullen v. Bowen*, 800 F.2d 535, 540–41 n. 5 (6th Cir.1986); *Association of ALJs*, 594 F.Supp. at 1141. Thus, the Secretary's efforts through peer review to ensure that ALJ decisions conformed with his interpretation of relevant law and policy were permissible so long as such efforts did not directly interfere with "live" decisions (unless in accordance with the usual administrative review performed by the Appeals Council). *See* 5 U.S.C. § 556(b) (administrative hearings "shall be conducted in an impartial manner"); *id.* § 554(d)(2) (ALJ shall not be "subject to ... supervision or direction" concerning pending matters). The efforts complained of in this case for promoting quality and efficiency do not infringe upon ALJs' decisional independence. Since Judge Elfvin concluded that the "Peer Review Program" was intended to be, and operated as, a quality control measure, we see no reason to disturb his determination.

Regarding the Secretary's policy of setting a minimum number of dispositions an ALJ must decide in a month, we agree with the district court that reasonable efforts to increase the production levels of ALJs are not an infringement of decisional independence. In a memorandum dated July 1, 1975, then Director Trachtenberg indicated that while he was opposed to the fixing of *quotas*, he was recommending a *goal* of 26 dispositions per four-week period. When Louis B. Hays became Associate Commissioner of the Office of Hearings and Appeals in 1981, he specifically concerned himself with ALJs whose productivity fell below twenty case dispositions per month. The record also reflects continuing pressure from the agency on ALJs to increase monthly dispositions.

The setting of reasonable production goals, as opposed to fixed quotas, is not in itself a violation of the APA. The district court explicitly found that the numbers at issue constituted reasonable goals as opposed to unreasonable quotas. Judge Elfvin explained that

> [a] minimum number of dispositions an ALJ must decide in a given period, provided this number is reasonable and not "etched in stone", is not a prescription of

how, or how quickly, an ALJ should decide a particular case. It does not dictate the content of the decision.

Moreover, in view of the significant backlog of cases, it was not unreasonable to expect ALJs to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required no less. Accordingly, we agree with the district court that the decisional independence of ALJs was not in any way usurped by the Secretary's setting of monthly production goals.

The Secretary's "reversal" rate policy embodied in the "Quality Assurance System," however, is cause for concern. To coerce ALJs into lowering reversal rates—that is, into deciding more cases against claimants—would, if shown, constitute in the district court's words "a clear infringement of decisional independence." *See also Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 1669–70, 72 L.Ed.2d 1 (1982). In his brief on appeal and at oral argument, Nash characterized the alleged pressure from the agency concerning reversal rates as the heart of the controversy. Plaintiff also maintained that the reversal rate policy, in effect from approximately 1975 to 1985, was implemented under the guise of improving the quality and uniformity of ALJ decisions but was in fact a clear attempt by the Secretary to influence ALJs into deciding more cases in favor of the agency.

The Secretary concedes that he was very concerned about reversal rates, but only to the extent that they might indicate errors in the decisionmaking of ALJs. Testimony in the record revealed that reversal rates were used as a benchmark in deciding whether there *might* be problems in the adjudicatory methods of particularly high (or low) reversal rate ALJs. Statistical record evidence supported the agency's proffered correlation between actual errors of law or policy in ALJs decisions and extremes in their reversal rates. The agency maintained then, and maintains now, that reducing reversal rates was not the intent of the policy. Indeed, a handwritten notation by Associate Commissioner Hays on a 1982 internal agency memorandum placed the policy in perspective:

> [T]here is *no* goal to reduce reversal rates—there is a goal to improve decisional quality [and] consistency, which is assumed to have as one effect a reduction of the reversal rate.

App. at 2071.

In view of the foregoing record evidence, therefore, we cannot say that the district court's determination was clearly erroneous. Whatever legitimate concerns there may be about the soundness of the Secretary's practices regarding "reversal" rates, those concerns are more appropriately addressed by Congress or by courts through the usual channels of judicial review in Social Security cases. *See generally* Rediah & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 499–500 (1986). The bottom line in this case is that it was entirely within the Secretary's discretion to adopt reasonable administrative measures in order to improve the decisionmaking process. *See Heckler v. Campbell*, 461 U.S. 458, 466, 103 S.Ct. 1952, 1956–57, 76 L.Ed.2d 66 (1983) ("'exceptionally broad'" authority is vested by Congress in Secretary to implement and administer Social Security Act) (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 43, 101 S.Ct. 2633, 2640, 69 L.Ed.2d 460 (1981)); *see also* 42 U.S.C. § 405(a), (b). Since the district court found no direct pressure on ALJs to maintain a fixed percentage of reversals, we conclude that the Secretary's policy in this regard did not infringe upon the "decisional independence" of ALJs.

CONCLUSION

For all of the foregoing reasons, the judgment of the district court is

AFFIRMED.

Mr. BARONE. If I might be permitted to take issue with what the gentleman just presented. Perhaps the GAO did not discern anything that struck them as improper or violating the letter or spirit of APA, I don't know. My statement I think makes the point quite well. There has been indirect pressure to establish quotas on the judges in the Office of Hearings and Appeals by the Social Security Administration. A quota is placed upon the front loading hearing assistant, a young lady who is responsible for taking a rough file that comes to us from a district office with perhaps 5 tons of paper

and reducing it to 1 ton, labeling that as exhibits and having that ready for the judge's review before the hearing. Then there is a lawyer who, after the whole process I described in my oral statement has occurred, is given instructions by the judge as to how to write the decision, and the decision is then edited by the judge. This attorney is also under a quota.

Then, how can they still say that the guy in the middle, the judge, is not being pressured with a quota. To me that is pussy footing around the letter of the law and violating the spirit.

Mr. MCDONALD. I will ask Mr. Klazkin to elaborate.

Mr. KLAZKIN. We looked at a number of the policies the judges complained about, travel policies, performance goals, case assignment, grouping cases by common venue, promotions, reassignments, and training, among others.

What we discovered was that if you read the cases decided by the Merit Systems Protection Board and the courts, the Social Security Administration is authorized to establish administrative procedures which do not affect the decisional independence of judges. That is the key phrase, "decisional independence of judges."

Some judges would suggest to you that almost any of these policies complained of might affect their decisional independence. But what the courts seem to say is that these kinds of administrative procedures are decisionally neutral. The type of policy that might not be decisionally neutral is one where, for example, you have to find 60 percent approvals, 40 percent denials. That would clearly not be decisionally neutral.

It is interesting that Judge Bernoski brought up the *Nash* decision because I don't think that really made his case. First of all, quotas are not always improper. The court says that unreasonable quotas are improper. But in that case the court determined that the Social Security Administration was using reasonable performance goals, not quotas. This is what the court concluded, if I may read from the case.

> In view of the significant backlog of cases it was not unreasonable to expect ALJs to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required no less. Accordingly, we agree with the district court that the decisional independence of ALJs was not in any way usurped by the Secretary's setting of monthly production goals.

That is the *Nash* case, March 7, 1989.

I would also like to say that although Judge Bernoski is correct in that ALJs are not subject to the statutory performance appraisal requirements that other employees are subject to, that does not mean that ALJs' performance cannot be evaluated. Certainly, I don't think any of us would contest the examples of an ALJ who did only one case over a 5-year period. That would seem to be improper in all likelihood and possibly we would not want that ALJ to be there.

The United States Code specifically says ALJs can only be removed for good cause. There are cases which state that the Social Security Administration would be remiss if it did not in fact evaluate ALJs to determine which judges were in fact not doing their job. The key with performance appraisal is that performance appraisal cannot be tied to pay for judges. That is the reason they are

not susceptible to the performance appraisal requirements that other Federal employees are subject to.

But certainly judges can be evaluated. Performance related disciplinary actions have been sustained by the MSPB and the courts.

Chairman JACOBS. Judge Drucker, do you have a response to what this gentleman just said?

Mr. DRUCKER. How you decide the case begs the question. What is involved is the process that goes into the decision. The decision is only as good as the process. I described what the process is. If that process is short circuited by the type of testimony you heard today and the record, it makes no difference how I decide the case because the decision will not be proper.

The process that precedes it will not be conducted in a proper manner. That is what we are about. If that process is driven by numbers in an intimidating and coercive fashion, then to me the process loses.

Chairman JACOBS. Let's invite Judge Bono to come back and comment.

Mr. BONO. Thank you, Mr. Chairman.

First of all, I would have to disagree with the statement that agencies can rate and evaluate the performance of their judges as implied by the gentleman from the chief counsel's office. There is a specific personnel regulation that prohibits agencies from rating and evaluating the performance of the individual judges. I think all too often the agencies forget that. Certainly the General Accounting Office forgets it and has forgotten it constantly as has the Office of Personnel Management forgotten it constantly over the past 10 years.

I have been involved in lawsuits involving this very specific issue. I have never had it propounded that anyone argues on a legal standpoint that agencies have the right to rate and evaluate the performance of their individual judges or that they should for obvious reasons. If you give them that power, you give them the power to destroy the impartiality of the judge and his independence.

I am not familiar with the legal authority that he indicated that would indicate that the *Nash* case says that. It does not say that agencies have the right to rate and evaluate the performance of their individual administrative law judges. I am somewhat bewildered by the proposition because I think we destroy the entire meaning of the APA if we go down this road and have been going down it in the Social Security Administration.

That is one of the reasons we are here today because of the extreme problems this has created. The agency knows it is not supposed to do what it has been doing and it continues to do it just on artful interpretations.

Mr. BARONE. Can I comment on that?

Chairman JACOBS. Someone somewhere said all litigation must end. I don't know if this applies to congressional hearings.

Mr. BONO. Mr. Chairman, if I may interject it is 5 CFR 930.211 performance rating, an agency shall not rate the performance of an administrative law judge.

Chairman JACOBS. Very good. Judge Sprague, if you have additional comments for the record, you may send them to us and we will put them in the record.

[The comments have been retained in the committee files.]

Mr. SPRAGUE. I thought I had burdened you over the years. He misquoted the *Nash* case. The *Nash* case does not say that reasonable quotas are——

Chairman JACOBS. Judge Bono made that point. We thank all of you. Let's call the next panel.

Bill Paulder, a Chicago man says "wars are impossible unless both sides are right."

As you know, as judges we have to pick out what is right. Thank you for your contribution.

Our final panel consists of the Honorable Jeffrey Tureck, Secretary, the Federal Administrative Law Judges Conference; the Honorable William B. Boham, administrative law judge, Office of Hearings and Appeals, Oak Park, Mich.; and Eileen P. Sweeney, staff attorney, National Senior Citizens Law Center.

Judge Tureck, you may lead off. I apologize for the delay. Someone is always at the end of the line, I guess. I know I am.

STATEMENT OF HON. JEFFREY TURECK, SECRETARY, THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

Mr. TURECK. Thank you, Mr. Chairman. Let me request the full statement I filed previously be made a part of the record.

Chairman JACOBS. Without objection.

Mr. TURECK. My name is Jeffrey Tureck. I am an administrative law judge with the U.S. Department of Labor and secretary of the Federal Administrative Law Judges Conference, the association representing administrative law judges in all Federal departments and agencies throughout the United States. I thank you for giving me the opportunity to speak with you today. For there is no issue of more concern to the Federal Administrative Law Judges Conference than decisional independence, and we applaud the subcommittee's interest in maintaining the decisional independence of the administrative law judges in the Social Security Administration's Office of Hearings and Appeals. The views that I express here today are on behalf of the Federal Administrative Law Judges Conference, and are not intended to be the opinions of any other organization or agency.

Decisional independence—the ability of a judge to conduct trials and render decisions free from outside influence—is the cornerstone of a fair and unbiased judiciary. As the U.S. Court of Appeals for the Fifth Circuit has stated:

> The first idea in the administration of justice * * * is that a judge must necessarily be free from all bias and partiality * * * Mankind are so agreed in this principle that any departure from it shocks their common sense and sentiment of justice.

NLRB v. *Phelps*, 136 F.2d 562, 563, n.1. (5th Cir. 1943), quoting *Inland Steel Co.* v. *NLRB*, 109 F.2d 9, 20 (9th Cir. 1940) (other citations omitted). This principle applies to the Federal administrative judiciary as much, if not more, than to the Article III Courts. As the court in *Phelps* went on to state:

> [A] fair trial by an unbiased and nonpartisan trier of the facts is of the essence when judging is done in an administrative proceeding as when it is done in a court. * * * Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed.

Phelps, supra, at 563.

Anything which impinges on the judge's decisional independence, and creates the possibility of bias either for or against a party, is anathema to our system of justice. As Justice Black has written for the Supreme Court in *In re Murchison*, 349 U.S. 133, 136 (1955):

> Every procedure which would offer a possible temptation to the judge * * * not to hold the balance nice, clear and true between the [parties] denies * * * due process of law. [Citation omitted] * * * [T]o perform its high function in the best way justice must satisfy the appearance of justice. [Citation omitted].

A judge's decisional independence can be compromised in many ways. Most obvious, a judge can be biased by having a direct financial stake in the outcome of a case, through an ownership interest in one of the parties to the case or in property whose value would be affected by the outcome. Similarly, the belief that the outcome of a case could lead to financial or other rewards, or the fear that the opposite outcome could lead to being fired, demoted, or reprimanded, could compromise a judge's impartiality. A judge's decisional independence could also be compromised in other, more subtle ways. For example, a judge perceiving that the number of decisions he or she produces can lead to punishment or reward may be influenced to issue decisions with less deliberation than is necessary to adequately analyze the evidentiary record and write well-reasoned findings of fact and conclusions of law.

Recognizing the importance of decisional independence, the Constitution provides Federal judges with lifetime tenure and guaranteed compensation. Similar protections are afforded Federal administrative law judges through the Administrative Procedure Act of 1946,[1] other legislation codified at 5 U.S.C. 5372, and the regulations promulgated pursuant to those statutes. In that regard, I don't understand the rationale for Mr. Stein's statement that he favored limited terms for ALJs and lifetime terms for other judges. But the specific protections afforded the Federal administrative judiciary by statute and regulation do not exhaust all possible avenues of undue agency influence, and vigilance is necessary to assure that the administrative judiciary's independence is maintained.

In *Butz* v. *Economou*, 438 U.S. 478, 513–14 (1978), the Supreme Court noted the importance of decisional independence for administrative law judges:

> [T]he process of agency adjudication is currently structured so as to assure that the [administrative law judge] exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were * * * often subordinate to executive officials within the agency * * * [T]he securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication * * *"

[1] 5 U.S.C. 551 et seq.

The Federal Administrative Law Judges Conference joins in this sentiment, and accordingly we strongly support any efforts by this subcommittee to protect the decisional independence of the administrative law judges of the Social Security Administration's Office of Hearings and Appeals. The claims these judges adjudicate, which vitally affect the financial well-being of so many people, should not be compromised by factors unrelated to the merits of their claims.

Chairman JACOBS. Thank you.

Judge Boham.

STATEMENT OF HON. WILLIAM D. BOHAM, ADMINISTRATIVE LAW JUDGE, OFFICE OF HEARINGS AND APPEALS, OAK PARK, MICH.

Mr. BOHAM. Thank you for inviting me. My name is William Boham, an administrative law judge from the Social Security Administration assigned to the Oak Park, Mich. office. I am here only in behalf of myself. My legal background includes the general practice of law, later, limited to the trial of criminal felony cases; and later, served as an ALJ for the State of Michigan.

In my 12 years as an administrative law judge for SSA I experienced a long history of management policies and tactics which have seriously interfered with judicial independence. The effect of this interference has not been limited to the administrative law judge. The most serious result has been the creation of a hearing system which commonly fails to apply the congressional mandated definition of disability. As a result, many applications of your constituents are not decided on their merits, but are disposed of on a basis of expediency in order to meet unrealistic targets which includes the number of hearings scheduled, and most importantly, the number of decisions issued.

Management aggressively imposes these targets with a system of rewards for those, including decision writers, who meet the targets, and retaliation against those who do not meet the targets.

The rewards include being assigned easier cases, given more desirable travel assignments, allowed freedom to abuse attendance standards, allowed to engage significantly in personal matters during the workday. Of course, no attempt is made to evaluate the professional quality of this work.

On the other hand, ALJs who do not meet the targets are assigned more difficult cases, assigned less desirable travel dockets, and are subjected to a variety of harassments and threats. This, notwithstanding the fact that the quality of work is often superior.

Necessarily, ALJs who meet the targets do so by means of many shortcuts, not by more work or a higher quality of work. These shortcuts include issuing decisions on the record—without a hearing—failing to properly develop the medical evidence, not scheduling necessary medical and vocational witnesses for the hearing, conducting abbreviated hearings, scheduling hearings with the intention of postponing the hearings prior to the hearing date, dismissing cases on frivolous grounds, and self-disqualification from complicated cases.

Engaging in these shortcuts is not so much a reflection on those ALJs as it is on a system which exerts tremendous pressure on subordinates.

My personal experiences have included the following: The one that seems to have attracted the most attention was a year ago, I was out of the office for about a week as a visiting judge. There was a recently appointed regional chief judge. When I came back on a Monday, on my way to the office I was stopped by two people working in our office, a staff attorney and a clerical. They both told me the same story, that this recently regionally appointed judge had been in the office the week I was gone and asked where I was. When he found out I was gone, he said, I am going to come back when he is here and I am going to kick his ass.

Chairman JACOBS. You don't own a donkey, do you?

Mr. BOHAM. No.

Chairman JACOBS. I want to clarify what he is talking about.

Mr. BOHAM. Later I was in my office and the regional chief judge came in. We were introduced to each other. Everything was calm for a few seconds. He asked me about the number of decisions that I get out. I said, "Are you familiar with my file with your predecessor on this?" I had exchanged memorandums with the prior regional chief judge. I gave him a very detailed memorandum, exactly how I handled my cases.

The new regional chief judge said, "No, I am not familiar with it." I said, I will explain it. I got about two words out when he said, "That is a bunch of shit, Boham, we know how to handle assholes like you." Later, he came back to my office with the office chief judge who he said he was bringing in as a witness.

He says you either schedule so many cases a month, he mentioned a figure that I forget, and then he said, "or else." I fired back and he turned around and the two of them walked out.

Chairman JACOBS. What is his name?

Mr. BOHAM. The regional judge, Theodore Haynes.

Chairman JACOBS. I wondered what you said when you fired back but I guess you can leave that to our imagination.

Mr. BOHAM. It was very similar words. Several years ago I wrote to the Associate Commissioner about the situation in our office at that time about one attorney taking files around which had not been assigned to the judge and soliciting the judges to pay these cases on the record to boost the production of the office.

Many of these cases were very questionable to pay on the record without a hearing. I turned some of them down. I thought it was improper. The case should be given to a judge and let the judge decide whether it should be paid on the record or not.

I wrote to the Associate Commissioner about this. The word got back to our hearing office chief judge apparently because he told me he contacted the regional office, it was stated a little vague but presented like a threat about the fact that I had been missing time from the office. I said I had not been missing time. He said I tried to reach you 1 day and you were not in the office. He said he would retract the prior memo he sent out.

It was also vaguely worded and I insisted that it be reworded. He told me himself that he sent that memo in just to shut me up.

Those were his exact words. That office chief judge's name is Blum, B-l-u-m. He is no longer the hearing officer judge there now.

I have been assigned more than my share of complicated cases. People who assume that the cases in OHA are fairly assigned out in a blind rotation, well it is simply not done at least in my office and I am sure in other places, easy cases are assigned to judges who are willing to pursue the shortcuts in order to get the higher statistics. All my assignments as a visiting judge has been to the boondocks as they are referred to the other judges go the more favorable trips.

I have been referred to in office memorandums as a slow judge, these references were made in a disparaging manner.

The regional chief judge refused to sign my request for annual leave. My staff has been harassed and embarrassed, being asked why I don't schedule more hearings, issue more decisions, why I don't hold shorter hearings. It also has been inferred that their job performance ratings might be affected by what I do.

Of course management knew all the answers before they asked the question. They were clearly designed to intimidate me. They could not intimidate me so they tried to do it through my staff. I expect this harassment to continue until management is selected on a more competent basis. OHA should be separate from the SSA. If SSA is allowed to directly or indirectly appoint the OHA managers and influence them, it will and the present situation will continue. The past has proven that moving SSA appointees in and out as OHA managers will not improve the situation but often makes it worse if that is possible.

The new system must be designed to assure the appointment of quality professionals as OHA managers.

There were two other areas of my written statement that I wanted to discuss, the shortcuts that some of the judges take.

Chairman JACOBS. We will include that in the record.

Mr. BOHAM. Very good. I will be glad to answer any questions.

Chairman JACOBS. Thank you.

[The prepared statement follows:]

HON. ANDREW JACOBS, JR., M.C.
CHAIRMAN, SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

DEAR MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE

MY NAME IS WILLIAM D. BOHAM. I AM AN ADMINISTRATIVE LAW JUDGE WITH THE SOCIAL SECURITY ADMINISTRATION ASSIGNED TO THE OAK PARK, MICHIGAN HEARING OFFICE. I AM HERE ONLY ON BEHALF OF MYSELF.

MY LEGAL BACKGROUND INCLUDES THE GENERAL PRACTICE OF LAW, SPECIALIZING IN CRIMINAL TRIAL CASES, AND SERVING AS AN ADMINISTRATIVE LAW JUDGE FOR THE STATE OF MICHIGAN.

THANK YOU FOR THE OPPORTUNITY TO COMMENT ON THE ISSUE OF THE JUDICIAL INDEPENDENCE OF THE SSA ALJ'S.

IN MY TWELVE YEARS AS AN ADMINISTRATIVE LAW JUDGE FOR THE SSA, I HAVE EXPERIENCED A LONG HISTORY OF MANAGEMENT POLICIES AND TACTICS WHICH HAVE SERIOUSLY INTERFERED WITH JUDICIAL INDEPENDENCE.

THE EFFECTS OF THIS INTERFERENCE HAS NOT BEEN LIMITED TO THE ALJ'S. THE MOST SERIOUS RESULTS HAVE BEEN THE CREATION OF A HEARING SYSTEM WHICH COMMONLY FAILS TO THOROUGHLY AND PROFESSIONALLY HANDLE CASES, AND COMMONLY FAILS TO APPLY THE CONGRESSIONAL MANDATED DEFINITION OF DISABILITY. AS A RESULT, MANY APPLICATIONS OF YOUR CONSTITUENTS ARE NOT DECIDED ON THEIR MERITS, BUT ARE DISPOSED OF ON A BASIS OF EXPEDIENCY IN ORDER TO MEET UNREALISTIC TARGETS WHICH INCLUDES THE NUMBER OF HEARINGS SCHEDULED, AND MOST IMPORTANTLY, THE NUMBER OF DECISIONS ISSUED.

MANAGEMENT AGGRESSIVELY IMPOSES THESE TARGETS WITH A SYSTEM OF REWARDS FOR THOSE (INCLUDING DECISION WRITERS) WHO MEET THE TARGETS, AND RETALIATION AGAINST THOSE WHO DO NOT MEET THE TARGETS.

THE REWARDS INCLUDE BEING ASSIGNED EASIER CASES, GIVEN MORE DESIREABLE TRAVEL ASSIGNMENTS, ALLOWED FREEDOM TO ABUSE ATTENDANCE STANDARDS, ALLOWED TO ENGAGE SIGNIFICANTLY IN PERSONAL MATTERS DURING THE WORKDAY. OF COURSE, NO ATTEMPT IS MADE TO EVALUATE THE PROFESSIONAL QUALITY OF THIS WORK.

ON THE OTHER HAND, ALJ'S WHO DO NOT MEET THE TARGETS ARE ASSIGNED MORE DIFFICULT CASES, ASSIGNED LESS DESIREABLE TRAVEL DOCKETS, AND ARE SUBJECTED TO A VARIETY OF HARASSMENTS AND THREATS. THIS, NOTWITHSTANDING THE FACT THAT THE QUALITY OF WORK IS OFTEN SUPERIOR.

NECESSARILY, ALJ,S WHO MEET THE TARGETS DO SO BY MEANS OF MANY SHORTCUTS, NOT BY MORE WORK OR A HIGHER QUALITY OF WORK. THESE SHORTCUTS INCLUDE ISSUING DECISIONS "ON THE RECORD" (WITHOUT A HEARING), FAILING TO PROPERLY DEVELOP THE MEDICAL EVIDENCE, NOT SCHEDULING NECESSARY MEDICAL AND VOCATIONAL WITNESSES FOR THE HEARING, CONDUCTING ABBREVIATED HEARINGS, SCHEDULING HEARINGS WITH THE INTENTION OF POSTPONING THE HEARINGS PRIOR TO THE HEARING DATE, DISMISSING CASES ON FRIVOLOUS GROUNDS, AND SELF-DISQUALIFICATION FROM COMPLICATED CASES.

ENGAGING IN THESE SHORTCUTS IS NOT SO MUCH A REFLECTION ON THOSE ALJ'S AS IT IS ON A SYSTEM WHICH EXERTS TREMENDOUS PRESSURE ON SUBORDINATES.

MY PERSONAL EXPERIENCES HAVE INCLUDED THE FOLLOWING. A HEARING OFFICE CHIEF JUDGE TOLD ME THAT HE HAD LIED TO REGIONAL OFFICE CONCERNING MY WORK ATTENDANCE IN ORDER TO SHUT ME UP (I HAD WRITTEN TO THE ASSOCIATE COMMISSIONER CONCERNING THE CANVASSING OF JUDGES TO "PAY" CASES "ON THE RECORD.")

A RECENTLY APPOINTED REGIONAL CHIEF JUDGE TOLD OTHERS IN MY OFFICE, IN MY ABSENCE, THAT HE WAS GOING TO KICK MY ASS. LATER, HE came into my office and started an argument with me, and called me "AN ASS-HOLE." HE THEN BROUGHT THE HEARING OFFICE CHIEF JUDGE INTO MY OFFICE "AS A WITNESS" AND GAVE ME AN ULTIMATUM TO SCHEDULE AT LEAST A CERTAIN NUMBER OF CASES PER MONTH "OR ELSE."

THIS INCIDENT WAS RATHER STRANGE FOR A NUMBER OF REASONS. I HAD NEVER MET THIS PERSON BEFORE, OR HAD ANY CONTACT WITH HIM. WHY DID A REGIONAL CHIEF JUDGE PERSONALLY COME TO MY OFFICE, RATHER THAN PURSUE THIS MATTER NORMALLY, IN WRITING, THRU THE ESTABLISHED LINE OF AUTHORITY? HE DENIED KNOWLEDGE OF MY COMMUNICATIONS TO HIS PREDECESSOR CONCERNING THIS MATTER. I HAVE HEARD ABSOLUTELY NOTHING FROM HIM, SINCE, RELATIVE TO THIS ULTIMATUM.

I HAVE BEEN ASSIGNED MORE THAN MY FAIR SHARE OF COMPLICATED CASES, AND HAVE BEEN ADVISED THAT I WAS NOT RECEIVING EASIER CASES BECAUSE I WAS NOT "COOPERATING." WHEN I ATTEMPTED TO DISCUSS THIS MATTER WITH THE DOCKET CLERKS, THEY ADVISED ME THAT THE OFFICE CHIEF JUDGE, PERSONALLY, INSTRUCTED THEM NOT TO DISCUSS THIS MATTER WITH ANYONE, INCLUDING THE JUDGES.

ALL OF MY ASSIGNMENTS AS A VISITING JUDGE HAVE BEEN TO THE "BOONDOCKS."

I HAVE BEEN INSULTED BY BEING REFERRED TO AS A "SLOW JUDGE" IN OFFICE MEETINGS AND MEMORANDA, AND THESE REFERENCES WERE MADE IN AN OBVIOUSLY DISPARAGING MANNER.

I HAD ILL-ADVISED CHARGES BROUGHT AGAINST ME BEFORE THE MERIT SYSTEM PROTECTION BOARD, CLEARLY FOR THE PURPOSE OF BREAKING IT OFF IN ME.

THE REGIONAL CHIEF JUDGE REFUSED TO SIGN MY REQUEST FOR ANNUAL LEAVE.

MY STAFF HAS BEEN HARASSED AND EMBARRASSED BY, AMONG OTHER THINGS, BEING ASKED WHY I DON'T SCHEDULE MORE HEARINGS, ISSUE MORE DECISIONS, HOLD SHORTER HEARINGS, ETC., AND INFERRING THAT THEIR JOB PERFORMANCE RATINGS COULD BE ADVERSELY AFFECTED BY THESE FACTS. OF COURSE, MANAGEMENT KNEW THE ANSWERS BEFORE THEY ASKED THESE QUESTIONS.

IN RESPONSE, I HAVE CONSISTENTLY MADE CLEAR TO MANAGEMENT THAT I WILL CONTINUE TO HANDLE MY CASES THOROUGHLY AND PROFESSIONALLY, AND SPEND AS MUCH TIME ON EACH CASE AND ON EACH STEP AS IS NECESSARY TO ARRIVE AT A PROPER DECISION.

I EXPECT THE HARASSMENT TO CONTINUE UNTIL MANAGEMENT IS SELECTED ON A MORE COMPETENT BASIS. AT A MINIMUM, OHA MUST BE COMPLETELY SEPARATED FROM THE SOCIAL SECURITY ADMINISTRATION. IF SSA IS ALLOWED TO, DIRECTLY OR INDIRECTLY, APPOINT OR INFLUENCE THE APPOINTMENT OF OHA MANAGERS, IT WILL-AND, THE PRESENT SITUATION WILL CONTINUE. THE PAST HAS PROVEN THAT MERELY MOVING SSA APPOINTEES IN AND OUT AS OHA MANAGERS WILL NOT IMPROVE THE SITUATION, BUT WILL WORSEN IT, IF THAT IS POSSIBLE. THE NEW SYSTEM MUST BE DESIGNED TO ASSURE THE APPOINTMENT OF QUALITY PROFESSIONALS AS OHA MANAGERS.

THANK YOU.

WILLIAM BOHAM.

Chairman JACOBS. Ms. Sweeney.

STATEMENT OF EILEEN P. SWEENEY, STAFF ATTORNEY, NATIONAL SENIOR CITIZENS LAW CENTER

Ms. SWEENEY. I think this hearing has been helpful in demonstrating that this system is a mess. I think it is wonderful that we have a new Commissioner and the vacancy in the Associate Commissioner for Hearings and Appeals. Maybe there will be some changes in the system.

I don't think it is unreasonable to have production goals. However, they have to be reasonably established and they have to be based on reasonable assessments. The fact that SSA is going to set up a task force to do that with ALJs involved is good but there probably needs to be an outside force like OPM involved so people can feel somewhat assured by the decisions which are made.

The 37 cases a month without the support that ALJs need which clearly does not exist, is outrageous. This situation has existed for a long time. In 1982 they started out with 20 cases as the first goal. It is creeping up. The only standard is how much work you can squeeze out of somebody. Quality is not a concern.

The effect for our clients is that they are not getting high quality decisions. I think you are a little dubious about the idea that these ALJs don't write their own decisions and that that is not a bad idea because Congressmen don't write everything and judges don't write everything in the Federal courts.

But under APA these ALJs are supposed to look at the person, talk to him or her, and look at the evidence. It is their judgment that becomes the key. The Federal courts only look to see whether there is substantial evidence to support their decisions. They don't rereview the entire file. They rely upon the fact that a real judge made an independent decision in these cases.

Right now, that doesn't exist. They are doing too many cases. They are basically portable evidence takers who hold hearings. Somebody else totally separate who is an SSA employee, a staff attorney, is writing the decisions in these cases. The illusion is that there is independence but for individual clients in many cases there is no decision by a person with APA protections right now.

The claimants just don't have that protection. That is what Judge Bono referred to as "removing the expertise" from the decision writing process. The ALJ doesn't have to write every word but Judge Rucker who was, until recently, the chief judge, identified the extent of the problem 2 years ago in his video about how to write decisions. He said that the ALJs have to give the staff attorneys more information, not just a happy or sad face up in the corner or "A" for allow and "R" for reverse. He said the ALJs have to give "clues" about what the case is about. That is not enough. They are supposed to sit there, assist the person and make judgments about all of the evidence, including credibility. That is not what happens in these cases right now. This problem is all tied into these numbers issues as well.

The other big issue is the one John Stein raised about bias. I am not sure "rampant" would be the word I would use but there are a lot of problems now with ALJs who make judgments about people

based upon their gender, race, their poverty, whether they think they have some other motivation for wanting disability benefits besides their impairments, who regularly ignore evidence in the file and find nobody deserves benefits. The record on Judge Stephens is amazing. SSA did not have a system in place until the Philadelphia case came up. They would not have a system now if it were not for the fact that there is a decent Secretary and decent Commissioner who are concerned about these types of problems.

SSA still doesn't have any system in place for identifying problems on their own, for taking the actions affirmatively without somebody else making the complaints. The advocates should not be prosecutors. SSA should have a unit that regularly reviews ALJ practices and takes action where needed. Mr. Enoff said you can file an appeal alleging bias and the Appeals Council will correct it. That is not adequate. Many people don't file the appeals. They receive the ALJs decision and they believe a fair-minded judge decided the case. They don't appeal. And, SSA remands cases back to the same ALJs.

SSA should have a system in place which takes action to make recommendations to the MSPB on behalf of the Secretary to assure that unfit judges are removed. This would improve overall the quality of the corps and also improve their status and reputation.

There are only two other points I would like to make. One is that—I will make one. I agree with Bill Dombi that there are very serious problems in the Medicare appeal area. If and when SSA is made an independent agency it will be very important that HCFA not have control over the Medicare appeals. If they could be put directly under the Secretary of HHS and not in the HCFA system, I think we will have a better chance of getting fair decisions in that area.

[The prepared statement follows:]

NATIONAL SENIOR CITIZENS LAW CENTER
Suite 400
2025 M Street, N.W.
Washington, D.C. 20036
Telephone (202) 887-5280

WASHINGTON, D.C.
BURTON D. FRETZ
EXECUTIVE DIRECTOR
ALFRED J. CHIPLIN, JR.
TOBY S. EDELMAN
VICKI GOTTLICH
PATRICIA B. NEMORE
EILEEN P. SWEENEY
STAFF ATTORNEYS

LOS ANGELES, CA.
NEAL S. DUDOVITZ
DEPUTY DIRECTOR
GAIL DEFORD
JEANNE FINBERG
PETER E. KUMLIEN - HANCEBERT
SALLY HART WILSON
STAFF ATTORNEYS

TESTIMONY OF EILEEN P. SWEENEY

STAFF ATTORNEY, NATIONAL SENIOR CITIZENS LAW CENTER

BEFORE THE SOCIAL SECURITY SUBCOMMITTEE

WAYS AND MEANS COMMITTEE

June 13, 1990

Mr. Chairman, I appreciate this opportunity to address the questions raised in the notice of the hearing. I would also like to suggest that there are a few other related matters which are also in need of attention.

From my perspective, the answers to the questions raised by the Subcommittee can be summarized very simply:

1. The current structure of the ALJ process at SSA does not provide a decision by a independent decisionmaker, as contemplated by the Administrative Procedure Act (APA) ALJs provide the illusion of the APA's application by their actual presence at the oral hearings. But, behind the scenes, non-independent staff, not the ALJs, develop the evidence and write the decisions.

2. Changes are needed to assure that ALJs are once again in charge of their staffs and that the ALJs are actually assessing the evidence, verifying it, and writing the decisions.

3. With these changes should come other improvements to the process. These included:

   A. Clear procedures for filing and reviewing complaints against ALJs;
   B. An ongoing effort by the agency to identify and remove ALJs who are no longer fit to serve as ALJs; and
   C. In significant effort to increase the numbers of woman and minority ALJs in the corps at SSA; and
   D. Elimination or, at least, substantial reduction in reliance upon traveling ALJs.

4. OHA needs more money for staff and supplies.

5. Finally, because the SSA ALJs also hear Medicate cases, it will be very important to keep this program in mind when devising solutions to the current situation.

<u>The pressures which have been brought to bear upon the SSA ALJs over the past decade make a very clear case for assuring them greater independence.</u>

Mismanagement at SSA and OHA throughout the 1980's until the middle of 1989 as well as a narrow vision of the mission of the Office of Hearings and Appeals made it increasingly difficult for ALJs to function independently. Because SSA and OHA control everything in the ALJ's

environment, except his/her title and salary, and because there has been a desire to limit the ALJs' independence, OHA focussed most of its attention on how it could utilize the ALJ's environment to coerce the ALJ into following the administration's misinterpretations and illegal applications of the law.

In the early 1980's, SSA's intentions were very clear. Under the guise of the Bellmon amendment, requiring own-motion review of ALJ decisions by the Appeals Council, SSA decided to review only decisions favorable to appellants. They targeted the ALJs with the higher allowance rates for review. The clear intent was to pressure high-allowance ALJs to deny more cases, regardless of the merits.

After Congressional hearings and litigation, OHA backed away from this blatantly illegal policy.1 However, SSA knew that it had two other tools available to it to coerce ALJs. First, it controls the staff who assist with writing decisions. (In fact, it appears that these individuals do virtually all of the work on the decisions, a development which the Congress should seriously consider as it clearly undermines the right of the individual claimant to have his/her appeal decided by an independent ALJ.) Second, because it controls everything else about the ALJ's work environment, it can adjust the misery index as it sees fit.

Who writes the decisions? Prior to some point early in the 1980's, ALJs had staff attorneys and clerks assigned directly to them: each ALJ had staff to assist him/her. Then, in a move termed "reconfiguration" of the offices, OHA decided that it would be better to pool all of the assistants into one group in each office, no longer assigned to each ALJ. It was not long before ALJs began complaining, publicly, that pooled assistants were ignoring their instructions regarding how particular decisions were to be written. The "independent" ALJs had staff who were not independent and were taking their marching orders from new bosses on the content of the decisions: OHA and SSA.

After awhile, the ALJs either became resigned to the situation or so overwhelmed with work that they had no choice in the next development: instead of spelling out to the assistant what the decisions should say, the ALJ would simply provide the assistant with some very conclusory statement regarding what the outcome in the case should be.

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1. See, for example, "Oversight of Social Security Disability Benefits Terminations," Hearing before the Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, U.S. Senate, 97th Cong., 2nd Sess., May 25, 1982. In Association of ALJs v. Heckler, 594 F.Supp. 1132, 1142, 1143 (D.D.C. 1984), the court noted that "...the evidence as a whole, persuasively demonstrated that the defendants [SSA] retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy." "...[D]efendants' unremitting focus on allowance rates in the individual portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof." In W.C. v. Heckler, 807 F.2d 1502, 1505 (9th Cir. 1987), the Ninth Circuit found that SSA designed the Bellmon review to alter ALJ decisions and "caused those judges to deny benefits in close cases where benefits might previously have been granted."

This development was spelled out in a videotape which then-Chief ALJ Rucker issued to ALJs.2 In the tape, Judge Rucker informed the ALJs that it is "critical" that there be "a communication link" between the ALJ and the decision writer. "It is no longer sufficient to send forth a file with nothing more than..."A" or "R" in the corner, or thumbs up or thumbs down or the happy face or the frowning face..." He indicated that to give the decision drafter a fair shot, the ALJ will need to give reasonable detail of a rationale, to provide "clues" "to the direction," "the landmarks" to write the decision.

First, it is outrageous that the situation has declined this far. Second, even the remedial instructions with Judge Rucker provided are outrageous: these ALJs are supposed to be carefully reviewing the file and considering the testimony of the witnesses. Under the current set-up, this is at best an illusion. The situation will only get worse as OHA moves to have staff attorneys conduct pre-hearing conferences. And, at the NOSSCR conference in April, 1990, then-OHA Associate Commissioner Bradley described recent changes at the Appeals Council. Few changes are now actually reviewed and decided by Appeals Council members: staff attorneys are now assigned this work.

What's most frightening about all of this is the illusion of fairness provided. The claimant <u>believes</u> that an independent judge reviewed all of the evidence and decided whether s/he was entitled to benefits. S/he does not know that this is not the case, that a staff attorney, not protected by APA, decided and wrote the decision. And, when s/he appeals to the Appeals Council, another staff attorney will decide what action will be taken. The courts are equally in the dark about SSA's real practices. They rely upon the fact that an independent, APA-protected ALJ decided the case after developing the record, reviewing all of the evidence, listening to all the witnesses, assessing creditability and weighing the evidence. They are sadly mistaken.

<u>The misery index</u>: During the 1980's SSA found many ways to make the non-conforming ALJ miserable. Secretarial staff would not be replaced. Leave-time to attend national meetings would be denied. Matters such as the availability of office space and size, desks, computer terminals, and other necessary elements of a modern office became contingent on how the ALJ behaved, how s/he exercised his/her "independence."

In addition to these tangible indicia, SSA also imposed "goals" for the number of cases ALJs have to decide monthly. These numbers have been climbing. One ALJ testified in 1982:

> "Meeting the heavy and ever increasing case load has not been without cost. My decisional quality is not as good as it once was. I do not have time to polish decisions. Instead of striving for good to very good decisions, I have to settle for good enough. I have shortened my opening statements at hearing and do not have time to prepare written questions for the claimant or witness in advance. There is less time to spend on each decision...My hearing assistant is preparing about 40 cases per month for hearing and she can no longer screen the cases and prepare the summaries as carefully as she did in the past."3

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2. "Writing Decisions that Withstand Legal Scrutiny" (SSA Videotape, 1988)

3. Testimony of Francis J. O'Byrne, Sr., Administrative Law Judge, before the Senate Subcommittee on Oversight of

That was 1982, the numbers are even higher now.

In addition to some of the other problems addressed in this statement, it is critical to focus on the problems which the lack of staff, the lack of independence, and the lack of time have upon the likelihood that a low-income, unrepresented appellant will receive a full and fair hearing. 20 C.F.R. §404.944 requires that the ALJ "fully" develop the record. This is particularly important in cases where the person is not represented.4 Right now (and for the past few years), advocates are finding some ALJs to be fairly hostile to their efforts to fully develop the record at the hearing, due to time pressures. In addition, there seems to be a growing trend in which the ALJ does not call the vocational expert to appear at the hearing and instead sends the expert interrogatories after the fact. This deprives the appellant of the ability to effectively cross-examine the witness. But, in both examples, the ALJ saves time. These problems arise in cases where the person is represented. Even more serious problems arise where the person appears without representation and the ALJ, pressed for time, does not meet his/her obligation to fully develop the record.

The structure under which ALJs control their own staff should be restored. However, in addition, there must be a requirement that ALJs decide and write their own decisions, not simply sign off on them. For some ALJs, this will not pose problems as they have continued to do most of their work. Others will be faced with changes. But, that is as it should be.

Changes should also be made to the chain-of-command within SSA. Under the independent agency provisions passed by this Subcommittee, the ALJs would be located in a unit headed by a Chief ALJ who would report directly to the three person Board. If independent agency provisions does not become law, consideration should be given to another modification in the structure. The focus should be on creating a structure which permits the ALJs to function as judges, viewing their APA-protected status as an asset rather than an obstacle.

Government Management, cited in Cofer, Judges, Bureaucrats and the Question of Independence: A Study of the Social Security Administration Hearing Process (1985).

4. Citing this Subcommittee, Justice Marshall noted the importance of this responsibility in his decision (concurring in part and dissenting in part) in Heckler v. Campbell, 461 U.S. 458, 475, n.3 (1983): "The availability of medical evidence, much of which supported respondent's claim of disability, was no substitute for an examination of the claimant himself. '[I]f the hearing is meant to be an individualized inquiry into how this claimant's functioning is impaired by his medical conditions, then the evidence must almost certainly come from the claimant himself, or from people who come in contact with him in his daily life. Since in most hearings no one other than the claimant is there to testify to his daily activities, who does not also have an interest in the success of the claim, it is imperative that ALJs draw out of the claimant, in great detail, information about how they function with their limitations. This is the crucial arena for credibility judgments by ALJs. Moreover, it seems clear that such judgments will necessarily be made, whether or not the claimant's situation is fully explored by the ALJ.' Subcommittee on Social Security of the House Committee on Ways and Means, Social Security Administrative Law Judges: Survey and Issue Paper, 96th Cong., 1st Sess., 47 (Comm. Print 1979)."

It may be possible to create such a structure within SSA as it currently exists. While it is difficult to assess what the difference would be, it is possible that if OHA was run by a Chief ALJ who reported directly to the Commissioner, rather than a political appointee who reported to the Commissioner, there would be tangible improvements. Possibilities include:

(1) The ALJs would have a visible advocate within the agency who could work to assure that their independence is restored and then protected. They would have a spokesperson within the SSA structure.

(2) It is likely that such a restructuring would necessitate a careful assessment of the changes needed to make the system work: to make sure ALJs are deciding and writing their own opinions pursuant to legally-mandated standards.

Such a change might have an effect on the production quota issue. However, because SSA is already not issuing ALJ decisions in a timely manner, it is difficulty to imagine that SSA or a Chief ALJ could ever agree to a return to the times when 10 or fewer decisions were issued by some ALJs in a month. At the same time, the result might be to call a halt to further increases in the production numbers for each ALJ.

If SSA remains within HHS, there is also the possibility that the ALJs could be removed from SSA and placed under HHS. This could be a useful strategy although it seems like it would be advantageous to first determine whether changes can be made with SSA (Either as part of SSA or within the independent agency) which would make this step unnecessary.

<u>OHA is seriously understaffed and lacking in resources at this time. In addition to staffing and supplies problems, OHA should also have its own budget for ordering consultative exams.</u>

There is increasing evidence that the cuts which have so severely affected staffing throughout the rest of SSA have also had their impact on the Office of Hearings and Appeals. The shortage of funds is manifesting itself not only in staff shortages but also in a lack of supplies. The Acting Chief ALJ for the Chicago Region (Region V) recently acknowledged the severity of the problems. In a letter, dated March 16, 1990, Acting Regional Chief ALJ Stephen Ahlgren stated:

> "The Office of Hearings and Appeals is, as you know, faced with severe budgetary and staffing shortages and we are consequently unable to continue to provide personnel for the purpose of making copies. As you know, we also face budgetary problems with respect to purchase of paper and it would be extremely helpful and most appreciated if members of the bar, legal aid organizations, and other groups or individuals who frequently use our copy machines would periodically donate several packages of copy paper."

This is not an agency which is functioning in top form. As this letter reflects, the consequences of a decade of serious mismanagement are being felt at every level of SSA; OHA is no exception.

It will be absolutely critical that OHA receive additional staff, that additional ALJs be hired, and that OHA (as well as all of SSA) have adequate funds to supply its offices.

Reliance on "travelling ALJs" should be eliminated or sharply curtailed.

Apparently in an effort to mimic the ability of corporate America to move employees around the country at will, much like pawns on a game board, over the past few years SSA has relied heavily on the use of "travelling ALJs." The use of these ALJs has created all sorts of problems for claimants and their advocates. These problems include:

- o Lack of access to the evidence in the case file until immediately before the hearing, when it is too late to be useful.
- o Unwillingness by travelling ALJs to seek the testimony of vocational experts because their presence at the hearing will the lengthen time of the hearing and reduce the number of hearings which can be held in one day.
- o Lack of understanding of local culture and even local geography, resulting in unwillingness to assist claimants in attending hearings by plane when there are no roads from their villages in places like Alaska.
- o Difficulty in keeping track of the case once the ALJ leaves the hearing site, with even greater difficulty in ascertaining when a decision might issue than in the typical case.
- o Unwillingness to postpone a hearing when the person has just secured representation right before the hearing, because the judge will not be able to meet his quota of hearings at the hearing site if postponement is granted.
- o Advocates complain that ALJs sent out on travel to hear cases often come from offices which have substantial backlogs of their own.

As part of any changes, Congress should require that (1) SSA eliminate its reliance upon traveling ALJs, permitting their usage only (a) within the area served by the local OHA to which they are assigned or (b) where exceptional circumstances arising only rarely, necessitate use. And, (2) whoever is responsible for OHA (if changes are made) or SSA (if no change is made) should be required to immediately undertake an assessment of the agency's need for ALJs (here, need is intended to mean numbers of ALJs, not the value of ALJs) and to report to the Congress or whether additional ALJ positions are needed in order to assure that (a) ALJs are able to decide their own cases, (b) local OHA offices are fully staffed, and (c) claimants are able to secure decisions in a timely manner.

Any legislation which enhances the independence of the administrative law judges should specifically set forth procedures for consideration of complaints in the cases of ALJs who are alleged to be biased against appellants.

While the vast majority of SSA administrative law judges take their legal responsibilities very seriously, there are some who are extremely biased against claimants. This bias manifests itself in different ways. Some may rule for the claimant but make it a habit of humiliating every claimant who appears before them. Advocates have told me that they know the outcome of the case when it is assigned to a specific ALJ just by looking at the color of their

client's skin. Most typically, the biased ALJ will misconstrue or ignore testimony provided by the claimant or other witnesses regarding the limitations on the person's activities of daily living, degree and persistence of pain, and depression. They also tend to misread the reports of physicians in order to conclude that the person's impairments are not disabling.

Until very recently, SSA has made no effort to investigate the complaints of appellants and their representatives. Now as a result of a petition to Secretary Sullivan,5 filed by attorneys in Philadelphia, SSA is investigating the allegations in that one case. And, as a result of two other cases filed in federal court,6 it appears that SSA may have additional investigations underway.

These three cases are only the tip of a small but very frightening and dangerous iceberg. There are other ALJs who should not be adjudicating cases any longer. If they once had it, they no longer retain judicial temperament needed. For whatever reason, they have lost touch with the program and the purpose of the program. When they can no longer decide cases fairly and instead resort to blanket rules and biases, it is time for them to be removed. They are unfit to be ALJs.

It will be very important that any legislation specifically state (1) the procedure to be followed in filing a complaint, (2) the procedure to be followed by the agency in investigating the complaint, and (3) that the Board has the authority to file charges against an administrative law judge with the Merit System Protection Board. In addition, Congress should consider requiring SSA to conduct a thorough review of the ALJ ranks to identify and file changes against such individuals.

Women and minority applicants and beneficiaries are seriously disadvantaged by current rules which make it very difficult for women and minorities to secure appointment in the SSA ALJ corps. The rules should be changed at least temporarily to assure that women and minorities are proportionately represented in the SSA ALJ corps.

In 1988, the General Accounting Office issued a report which found that there were only 40 women employed as ALJs throughout the entire federal ALJ corps, which at that time

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5. In re: Petition against ALJ Theodore Stephens

6. Grant v. Sullivan, 720 F.Supp. 462 (M.D.Pa.1989), class certified at No. 3:CV-88-0921 (M.D.Pa.2/21/90) [challenging bias of ALJ Russell Rowell, class likely to include about 700 individuals whose cases were decided unfavorably by ALJ Rowell] See also, Small v. Sullivan, No. 89-5262 (S.D.Ill. filed November 29, 1989) [challenging bias of ALJ Robert E. Ritter, based in St. Louis, Missouri; In general, the bias claim against ALJ Ritter, as set forth at paragraph 34 of the Complaint, is as follows: "ALJ Ritter does not decide cases on the basis of the evidence adduced at hearing. Rather, he manipulates the evidence to produce unfavorable decisions. Among other things, he abuses his discretion to make adverse credibility determinations for claimants, their witnesses and doctors; he ignores or misstates medical evidence; he draws impermissible conclusions based on his observation of the claimant by applying the 'sit and squirm' test; he makes ex parte communications with doctors; his leading questioning of claimants presumes the answers; and, for unrepresented claimants especially, he fails to develop the record."

numbered "nearly 1,000."7 At the same time, 650 of these ALJs were assigned to the SSA to conduct Social Security and SSI appeals. Even if all the women ALJs were assigned to SSA they would constitute only 6% of the SSA ALJ corps. In fact, there are even fewer women ALJs at SSA and their percentage is even lower. There is reason to believe that minority ALJs are almost as scarce at SSA.

According to the GAO, this skewed representation is the result of the application of the veteran's preference to these positions. Congress needs to seriously consider whether the almost complete absence of women and minorities from the SSA ALJ corps is having a negative impact on the decisions which women and minority applicants and appellants receive from SSA's ALJ corps.

There have already been very strong suggestions in the literature8 that women who are older and/or disabled are often not properly evaluated and treated by male physicians who discount their problems such as pain, depression, and disorientation and discredit their concerns and statements. And, there is a growing body of research in the legal world which suggests that women are not treated fairly in state justice systems.9 Like almost all areas of the law, these state justice systems have continued to be populated largely by male judges.

While there has been no comparable study in the Social Security ALJ setting, it seems reasonable to suggest that this system, in which the medical and the legal dovetail, is highly likely to be subject to exactly the same types of problems. The net result in this context may very well be that many severely disabled women are not receiving the

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7. "Administrative Law Judges: Appointment of Women and Social Security Administrative Staff Attorneys," GAO/GGD-89-5 (October 1988), page 2.

8. See, for example, Sally White, M.D., "Combating Ageism and Sexism in Medical Care," Network News, National Women's Health Network (March/April 1984). "Older women cannot count on the medical profession. Few doctors are interested in them. Their physical and emotional discomforts are often characterized as post-menopausal syndrome, until they have lived too long for this to be an even faintly reasonable diagnosis. After that they are assigned the category of senility." Robert Butler, Why Survive: Being Old in America (NY:Harper-Colophon, 1975), quoted in The New Our Bodies, Ourselves, Boston Health Collective, page 456 (1984). See also in that text, "The Politics of Women and Medical Care," pp. 555-597.

9. For example, in Maryland, the Maryland Special Joint Committee issued its report, entitled Gender Bias in the Courts (May, 1989). The Committee was appointed by the Chief Judge of the Court of Appeals of Maryland and the President of the Maryland State Bar Association. It defined gender bias "as it affects the judicial system to include four aspects. Gender bias exists when people are denied rights or burdened with responsibilities solely on the basis of gender. Gender bias exists when people are subjected to stereotypes about the proper behavior of men and women which ignore their individual situations. Gender bias exists when people are treated differently on the basis of gender in situations where gender should make no difference. Finally, gender bias exists when men or women as a group can be subjected to a legal rule, policy or practice which produces worse results for them than for the other group." (page iii) They then concluded that "It is clear to all of the Committee's members that gender bias in all of its forms is found within the judicial system of this State." (Id.)

benefits to which they are legally entitled. While the appointment of women ALJs would not immediately alleviate gender bias, it would certainly help to move the decisionmaking in the correct direction.

The Congress should consider this issue. There are solutions which would help here. One would be to simply give minority and women ALJ candidates the same extra points received by veterans until such time as they are proportionately represented in the ALJ corps at SSA. Another would be to permit SSA greater latitude in choosing individuals from the list of candidates qualified to be ALJs. This route is noted in the GAO's report as a possible solution.

This issue needs to be acted upon quickly. SSA is already in the process of hiring 115 new ALJs and plans to hire another 115 in the next fiscal year. Unless the rules are changed, it is highly unlikely that more than a handful of these new ALJs will be minorities or women.

In establishing SSA as an independent agency and moving the Social Security and SSI appeals under the jurisdiction of the new Chief ALJ, it will be especially important that Congress also include provisions which will assure the independence of the ALJs who will be deciding Medicare cases.

There are equally serious, if not more serious, questions regarding the independence of the ALJ decisionmaking process in Medicare appeals. Currently, these appeals are also handled by SSA's ALJs. If SSA is made an independent agency, it will be very important to include as part of the transitional provisions protections with regard to how Medicare appeals will be adjudicated and by whom. If the Medicare cases are not permitted to move with the ALJs to the new agency, then it will be critical that adequate safeguards are put in place. The two key safeguards needed are : (1) An Office of the Chief ALJ should be established within HHS (at the Secretary level, not at HCFA) to oversee Medicare appeals. (2) T

he ALJs must be accessible locally (as they are through SSA), sitting in communities convenient to Medicare beneficiaries and claimants. Without specific statutory instruction, it is very possible that the independence of ALJs adjudicating these appeals will be even further eroded.

Thank you for considering my views.

Chairman JACOBS. On that point of who writes the opinions, I mentioned Members of Congress, I take some pride in the fact that I have never seen anything in my life that I have not read. I think there are Government and corporate procedures where anonymous words are written for someone else to portend is a sad decline in our society. I think it is outrageous that the American public would even begin to accept the term "presidential speech writer." I mean Abraham Lincoln had a speech writer? Something has gone wrong.

I don't think people should accept what I would probably call plagiarism. On the other hand while I don't see any disparity between the circumstances of the ALJ and the circumstances of Federal district judges so far as tenure is concerned, dealing with the same material and generally with the same kind of work, I am aware that much of the opinions of Federal district judges is written by clerks as well.

Would you agree with that?

Ms. SWEENEY. I am sure that is the case.

Chairman JACOBS. I don't know how you go about reforming the thing up and down the line. I was a litigant myself, voluntarily a couple of years ago, in a libel case, we won it in summary judgment. But I had the distinct impression that I was not reading the

judge's words in the opinion that granted the motion for summary judgment.

I have one question, how say you on the veterans' preference?

Ms. SWEENEY. I think veterans' preference is affecting not just women in terms of getting ALJ positions but also minority attorneys. My guess is, obviously there are lots of individuals who are not white who served in the Armed Forces in this country. I don't think the combination, though, of being a minority and also being an attorney who is a veteran is all that common. It seems like the number of minority ALJs is just as low as the number of women ALJs. From my perspective, it is nice to advocate there should be more women and minority ALJs just for the sake of equality, but the real consequences are to the claimants. The studies show that male doctors discredit testimony from women about their pain, about the problems they have. There are now studies in a number of State court justice systems, Florida, Maryland, New York, about the fact that women fare very poorly in justice systems that are male dominated.

In this system where you have the medical and legal dove-tailing there is no reason to think it will be any different.

Chairman JACOBS. These two witnesses, did veterans' preference play a role in your appointment?

Mr. BOHAM. No.

Mr. TURECK. No.

Chairman JACOBS. I wonder to what degree veterans' preferences play a pivotal role in the appointment of the ALJ.

Ms. SWEENEY. There was a report done for Representative Levin which says the reason why women are not becoming ALJs——

Chairman JACOBS. That is the conclusion. The factor, if you know, is what percent of ALJs now can be fairly said to have obtained their position with the assistance of veterans' preference?

Mr. SWEENEY. Mr. Pettibone from OPM is here.

Mr. PETTIBONE. I am Craig Pettibone, Assistant Director of the Office of Administrative Law Judges, OPM. Historically more than two-thirds of the candidates selected for the jobs continue to be veterans.

Chairman JACOBS. They are advantaged by it?

Mr. PETTIBONE. Yes. They receive 5 or 10 points in our examination. It clearly gives them an advantage.

Chairman JACOBS. So the random sample is not representative as far as statistics are concerned?

Mr. PETTIBONE. No. I would say two-thirds of the judges and applicants continue to be veterans. One-third of the applicants are veterans today but because of the impact of veterans' preference, two-thirds of those applicants selected continue to be veterans.

Ms. SWEENEY. Mr. Pettibone, in his statement to the ABA law section in Williamsburg a couple of months ago, said women and minorities on the ALJ test actually do better than men but because of the veterans' preference they do not receive the jobs.

Mr. TURECK. Can I just make one comment? I cannot let this go, the comments about judges not writing their own decisions. As far as I know the ALJs for most agencies in the Government do not have law clerks and write every word of every decision they issue.

As far as the Department of Labor goes, there are times when we have law clerks and some when we did not. But I think the judges in those circumstances check every word, change words, change statements and change outcomes.

I cannot leave this panel with that impression. We write our own decisions.

Ms. SWEENEY. Not at the Social Security Administration.

Mr. DRUCKER. Mr. Chairman, I want you to know that I issue seven pages of instructions discussing credibility and the necessity of exhibits. I do not put smiling faces on my hearing decisions.

I think it is my job to instruct the attorney adviser to write a recommended decision which is a draft which I then correct. Some other judges do not do that. As far as I am concerned they are not performing their duty.

Chairman JACOBS. Judge Boham, you will have the last word.

Mr. BOHAM. What I have observed in SSA is that very few of the judges actually write their own decisions. I give very detailed decisions to the decision writers by way of a tape, I record them. I have seen many judges in our office give very brief instructions such as reverse, favorable, and no other instructions.

My understanding is that the decision writers go through the decision and prepare a decision for the judges with those instructions as the decision writers think that case would support that conclusions.

Chairman JACOBS. Thank you. I might say that today has been kind of a legalistic hearing. There is a story about an all lawyer jury which was out for 6 years. When the bailiff listened at the door and reported back, they were still making nominating speeches. I am happy to say this hearing today has been more efficient than that.

It really has been very helpful, I think, to us in making some judgments about policy in the future. I think most people want to do right. Most of us are in the dark a lot of the time. This has been enlightening.

Thank you.

[Whereupon, at 1:40 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to

Office of Hearings and Appeals
204 Federal Courthouse Bldg
655 First Avenue North
Fargo ND 58102 239-5342
Telephone (701) [redacted]

May 4, 1989

Ms. Elaine Fultz
Professional Staff Member
U. S. House of Representatives
Committee on Ways and Means
Subcommittee on Social Security
Washington, D.C. 20515

Dear Ms. Fultz:

I have your letter of April 25, 1989, with enclosed GAO Report. I appreciate the opportunity to comment.

I have practiced law in one form or another since July 1951, and in that time have had my own practice in western North Dakota (1953-1967), employment as an assistant U. S. Attorney and as a U. S. Attorney in the District of North Dakota (1967-1977), and finally as an administrative law judge in Michigan and North Dakota (1977-1989). As such, I have represented clients pursuing Social Security benefits of one form or another, have represented the United States in the federal district court relating to Social Security cases, and have conducted more than 4,500 hearings as an administrative law judge.

The GAO report essentially recommends a face-to-face interview at the reconsideration level by Disability Determination Service, and without doubt, such a procedure would increase DDS's allowance rates - perhaps dramatically. At times, there is no viable substitute for seeing and hearing a claimant and incorporating highly subjective factors into the final determination. Often at the administrative law judge level and thereafter, equity factors become installed into the overall analysis in keeping with the liberal intent of the Social Security Act.

Whether or not DDSs could, under existing workloads, regulations, fund allowances, etc., handle such an additional workload is problematical. The geographical areas handled by Fargo OHA (all of North Dakota, part of South Dakota, part of Minnesota, and part of Wisconsin) seem strained beyond capacity at this time. Presently, we are seeing less and less DDS development of the medical records and, at times, we seem to be developing cases from scratch - an expensive and time consuming process at our level.

Thus, while I believe a face-to-face interview in even selected types of claims would dramatically increase favorable dispositions to the claimant at the reconsideration level, I also believe that such a change would be another bandaid approach to the overall existing problems. We are seeing a considerable duplication of efforts in the recent use of hearing examiners in cessation of disability cases.

The GAO report at page 16 states, "although the criteria for determining disability remains the same, ALJs provide claimants a somewhat different evaluation process than DDSs do." It is then noted that ALJs obtain additional evidence, use expert witnesses, and interview the claimant, who often has legal counsel, and that these differences contribute to case presentation and development. All of this is true except the original premise that the "criteria remains the same." This constant criteria was intended to exist but, in fact, it does not, and that has always been a crucial distinction in the process. To be sure, the ultimate case examined and determined by an ALJ is seldom the same case determined by DDSs. It is a traveling stream of evidence and no entity "puts the same foot in the same water."

The original concept of disability appears to stem from a need to find a pure medical disability such as obtained when a medical listing is met or equalled. This continues, in my view, to be the guiding beacon in DDS's evaluations. As the file proceeds into the ALJ, Appeals Council, and federal court levels, other considerations become almost equally as important in the overall determination of disability or not. Only the constant that there must be a medical impairment established by objective evidence remains.

While DDS's programmatic instructions are said to follow the current law and regulations, this is simply not true. The thrust of a DDS's determination remains essentially a medical evaluation, with little or no vocational considerations. As such, the simplest case for DDSs to evaluate is one that can be determined on medical considerations alone, such as a case that requires either a meeting or equalling of a medically listed impairment, e.g., disabled widows and widowers, children under the age of 18, and other cases that may approach such severity. Now, because of downsizing and lack of adequate funding, development even on that basis has been curtailed, making the present DDS's processing all the more unreliable.

Let me illustrate by example:

1. Pain. Pain is without question the most troublesome aspect of disability evaluation at all levels because of the highly subjective and individualistic nature of pain. An ALJ often finds pain, whether based on exertional or nonexertional factors, the primary determinative factor in disability. Often, an ALJ will find pain exceeds problematic expectations on medical criteria bases alone and will incorporate such other factors as the credibility of the testimony of the witness and the appearance of the claimant. Often treating physicians will state that

while they can find little etiology to explain the degree of pain, they firmly believe that the pain is as severe as claimed. DDSs are presently not equipped to find severe disabling pain except in cases wherein the objective medical evidence is expected to produce such a severe level of pain. Example: Crohn's disease, cancer conditions, pancreatitis, etc. Thus, while the Administration pays lip service to consideration of pain at the DDS's level, this is seldom the case. Pain consideration is reserved in the main for evaluation at a formal hearing.

2. Credibility questions. An ALJ is required in our circuit (8th C.A.) and other federal courts to make specific credibility findings. It will no longer do to simply state that a witness is not credible. Specific, detailed and rational reasons must be set forth disputing or denying credibility of a claimant, a supporting witness, or a documentary report of a treating or attending physician. At times, this becomes difficult, if not impossible, for an ALJ to do, as the proceedings are not deemed adversary and an ALJ must retain neutrality between the applicant and the trust fund. At times, the federal courts, as well as the Appeals Council, have remanded cases for rehearing because specific reasons have not been set forth as to credibility findings of even rather remote witnesses to the proceedings. The 9th Circuit Court of Appeals has recently determined that unless specific reasons are set forth detailing why a claimant is determined not credible, that claimant's testimony (seemingly irrespective of patently specious testimony) must stand as unrebutted and credible testimony. This is an important change and one that likely will markedly increase favorable decisions to claimants. DDSs never make credibility finds for any paper generated witness statements, nor do they seem to have that requirement.

3. Credibility of treating physicians. While this is somewhat duplicative of 2. above, it is worthwhile to emphasize the high regard and deference the federal courts pay to treating and attending physicians. An ALJ cannot disregard opinion testimony of a treating or attending physician without detailed, specific and reasonable rebuttal findings. Most often that physician is not present so the denial of credibility must somehow be premised on discrepancies in the medical record. In several areas of the United States, federal courts are requiring that treating physician reports include a residual functional capacities assessment. Of course, if that RFC is not accepted as credible, detailed findings will have to be set out disputing such an assessment. DDSs deny disability in the face of one or more reports from a treating physician concluding total and permanent disability. No credibility findings are ever set out as to why a conclusion of disability is not facially accepted.

4. Vocational testimony and shifting burden of proof. The burden of proof is always upon an applicant to establish a finding of disability. However, current law engendered by the federal courts (initiated in the 8th C.A.) requires that once a claimant has established an inability to perform past relevant work, the burden of going forward shifts to the Secretary (HHS) to establish that claimant can perform

other work existing in significant numbers in one or more of the various regions of the United States. This court-mandated requirement is required by the Appeals Council and almost every circuit court in the U. S. Thus, an ALJ must have expert vocational testimony to establish other work if a claimant establishes by a preponderance of the evidence an inability to perform past relevant work. It is also necessary and universally required that vocational testimony must be adduced to establish an ability to perform work in cases wherein the impairment is nonexertional, such as asthma, failed eyesight, hearing impairment, skin disorders, or even nonexertional pain cases. Vocational testimony is required in cases to establish skill levels and whether skills are transferable, readily transferable and/or highly marketable. All of the above imposes a duty upon an ALJ to have vocational testimony in at least 75-85% or all cases heard. DDSs do not even come close to abiding by these vocational requirements. DDSs simply are not configured to handle such vocational assessments and vocational assessments, if done at all, are by book reference usually to the DOT.

5. Effects of medication. An ALJ is required to assess any untoward effects of medications, particularly prescription medications, such as drowsiness, dizziness, blurred vision, etc. It would be seldom that any DDS's determination ever included such an assessment.

6. General development criteria. DDSs are mandated by regulation to develop a case. Sometimes the only medical reports in a file are DDS-generated. However, the quality of development has declined markedly. An ALJ is presently required to instigate routine development of existing medical records and to generate the receipt of new medical evaluations, particularly in cases showing a history of alcohol or drug abuse, emotional illness, or some suggested, but ill-defined impairment. The Appeals Council and the federal courts are requiring exhaustive development. At times it appears every straw in the wind must be ground into an analysis. DDSs usually confine their development to major allegations. This is likely because of reduced resources, both personnel and income related. If, for example, a history taken by an orthopaedic surgeon includes a reference to hysteria, conversion reaction, or drug and/or alcohol consumption, it is necessary to procure consultative examinations to prove or disprove the existence of such further impairments or face remand or reversal. The burden of development at OHA level is increasing dramatically. We are receiving less developed cases from DDSs and more development remands from the Appeals Council.

I believe the above will illustrate marked and dramatically different criteria approaches to disability determination. While the definition of disablity remains constant the application of standards is appreciably different and all of this results in appreciably different results.

There are many other material and significant determinations made at the ALJ level that are not a part of the equation at DDSs.

I believe that representatives, particularly lawyers specializing in disability cases, presently view the DDS's initial and reconsideration determinations simply as formalities to complete before any real effort is made by them to develop a case further. There are a number of specialists that seldom prepare a case thoroughly until after hearing, believing their chances of success are better than 50% on any record. If they lose, they begin the process of preparation at the Appeals Council level and in almost all instances are successful in obtaining a remand. The last statistics on AC remands that I am aware of (last October) was 46% of all reviewed cases were remanded.

Thus, while I believe the GAO recommendation has merit and will offer some reduced caseload at the ALJ level (and further), I am not optimistic that the system, as it is presently constituted, can much longer survive. The weight of numbers and requirements will eventually cause the system to collapse upon itself - a veritable black hole will result.

Congress should examine and consider an entirely different system of disability evaluation. I have some ideas on that and will define those to you in another letter if you are interested. Presently, I have in the main responded to the GAO report. It is an improvement in concept and would be better than doing nothing. It is not the answer, and I think you can see that while the regulations defining disability are to be universally confirmatory to the whole, they simply are not being dispatched and observed in that manner.

I note, as a caution, these views are exclusively my own and most certainly will not be espoused favorably by the Social Security Administration. You may, however, make such publication of this letter as you wish.

Very truly yours,

Eugene K. Anthony
Administrative Law Judge

EKA/mo

MAXWELL DARKS
United States Administrative Law Judge
Suite 700 - Main Place Building
420 West Main Street
Oklahoma City, Oklahoma 73102

December 11, 1989

Honorable Andy Jacobs, Jr., Chairman
Sub-Committee on Social Security
U. S. House of Representatives
Washington, D.C. 20515

Dear Congressman Jacobs:

Administrative Law Judge Richard Sprague asked me to submit to your Committee any data that I have which might help shed some light on the operation of the Office of Hearings and Appeals.

First of all, every employee in the office is on some kind of quota for production without regard for accuracy or quality unless they work in management. I have 6 managers from GS-6 thru GS-15 overseeing my work (See Exhibits 1 through 5).

In addition thereto, the non-management ALJ's have no one working under their control that are accountable to us. Control of staff was removed from us following the Court's decision in 597 F.Supp. 1132 in 1984 in the Federal District Court in Washington, D.C. in which Judge Green refused to issue an injunction against Social Security to stop the harassment of the non-management ALJs. Her theory seemed to be that after all of the information of misconduct that was made public in this case Social Security would reform and treat us properly. Reform? They then removed our staff and left us resembling a Lt. General in pay and personal accountability, but with no control over our troops, or staff in our case.

The staff has doubled in size since then with very little, if any, increase in overall production of cases. People that I have never seen and don't know and cannot contact are writing decisions for me in the so-called development centers scattered throughout the United States. (See Exhibits 6 through 9)

We have gone to a system called "reconfiguration" where I really don't know who is doing what because the employees assigned to me continually change. Job Descriptions and accountability are so vague that management has a free hand in ignoring the wishes of the non-management ALJs in connection with quality, etc. of the work product in order to meet production quotas. (See Exhibits 10 through 18)

Title 5 U.S.C. 3105 says that the cases will be rotated, as near as possible, between ALJs. What is happening is that management is assigning the easy cases to their favored ALJs throughout the United States. While at the same time, the slower more difficult cases are assigned to less popular ALJs, the ones that are critical of this system. When our production falls, and we don't meet quotas, then we are ridiculed and our life becomes intolerable around the office and elsewhere. (See Exhibit 1). Many of the ALJs are depressed, suffering great anxiety, and fearful because of this treatment. (See Exhibits 19 through 21)

At the hearing we are, many times, in touching distance of claimants just out of the penitentiary, or mentally ill, or suffering from active T.B. or Aids, with no security guard present or available nearby many places we hold hearings.

The quality of the hearings is determined to a large degree by the demeanor of the Administrative Law Judge and the quality of the support staff supplied to the Administrative Law Judge at the time of the hearing. In a letter of August 8, 1989 to the Secretary of Health and Human Services from Judge Donald P. Lay of the U.S. 8th Circuit Court, he says in part, "I hope you will continue to encourage Administrative Law Judges who have greater contact with the public than most judges throughout America, to treat claimants with the upmost courtesy and with the greatest degree of fairness" (Emphasis by ALJ).

This is not only deplorable treatment of the ALJs, but most of all...it is not fair to the claimant.

Yours truly,

H Maxwell Darks

H. Maxwell Darks
Administrative Law Judge

Enclosures

JAN 09 1990

Office of Hearings and Appeals
352 South Saginaw Street
Room 300
Flint, Michigan, 48502

December 29, 1989

Hon. Andrew Jacobs, Jr., Chairman
Sub-Committee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C., 20515

Dear Congressman Jacobs:

We are writing to you at this time to give you our input relative to the problems which have been faced by the Administrative Law Judges in the Social Security Administration incidental to their responsibility to provide the American public with a fair hearing process. The primary impediment to the proper discharge of the Administrative Law Judges' responsibility to properly and responsibly discharge their duties in this regard, is the insistence on the part of the Administration that performance quotas, "goals" as they describe them, be adhered to.

Even though the Administration has time and again been informed by representatives of Congress and by the Federal District Courts that such an exercise of authority is clearly improper, and even though such exercise of authority has expressly been prohibited, such abuse continues today and in fact is even more vigorously enforced by the Administration than it was in the past.

We believe that our office is in a particularly good position to illustrate just how vigorously the productivity quotas have in fact been enforced recently. In February of 1989, the Flint, Michigan Office was advised that because it was a so-called low-producing office, a large part of its service area would be turned over to other offices who, in the opinion of the Administration, were scheduling and hearing Social Security cases in a more expeditious manner. Of course, incidental to the transfer of the Flint, Michigan service area to other offices, would be the requirement that all Judges in the Flint office would, of necessity, have to become more substantially involved in travelling to hear cases in other locations. This was true, because with the reduction of the service area which had formerly been handled by the Flint office, there simply would not be enough cases being processed by the Flint Judges to enable them to schedule full dockets. At no time was it ever specifically indicated that incidental to the reduction of the Flint office service area, that such travel would become necessary, but

it was certainly evident that such was the fact since very shortly thereafter a multitude of travel dockets were forwarded to the Flint office.

Even more significant was the fact that the Flint Office of Hearings and Appeals staff was advised, and it was suggested, that if they wanted to seek employment in other O.H.A. offices, they should feel free to do so immediately. However, it was expressly indicated to the Flint staff that they should not seek transfers to the Lansing, Michigan office. Needless to say, it had already become apparent that the Lansing, Michigan office had been targeted with the same sanctions which were being imposed on the Flint office. Fortunately, none of the Flint staff elected to follow the suggestions and recommendations of the Administration. Thus, the staff at the Flint office remained intact as opposed to the situation which developed in Lansing, Michigan, wherein the Judges located there almost completely lost their entire staff.

It should be noted that the unfolding of events which took place in February of 1989 in both Flint and Lansing, Michigan, took place without any warning whatsoever that such action was going to be taken by the Administration. It should also be pointed out that at least in Flint, Michigan, there was really no problem as to productivity. The Judges in this office were scheduling between 35 and 40 cases a month, and they were issuing decisions at the rate of 30 to 35 per month. Certainly, such conduct on the part of the Flint Judges was consistent with providing the public with timely access to the hearing process and in accordance with due process. Obviously, that opinion was not shared by the Administration.

Fortunately, since the Flint office remained intact, and although there were increased travel dockets which had to be contended with, this office was able to maintain an adequate disposition rate and evidently met the production quotas which were established by administrative personnel in the Region V office headquartered in Chicago, Illinois. Ultimately, after several months and after considerable assistance from our elected representatives in Congress, this office's pre-existing service area was returned to it, and business is now being conducted as usual. However, ~~all of our pre-existing problems~~ are still very much in existence. Obviously, the above-mentioned sanctions ~~could be reapplied at~~ any time in the future should the Administration desire to do so. The question still remains one of which interest is paramount, that of due process and the welfare of a given claimant or the pursuit of productivity "goals" by the Administration.

We believe that it is apparent from the above scenario that not only does the Social Security Administration still very vigorously enforce production quotas which are that and simply that, but it has even gone one step further in that it is now willing to impose severe sanctions on any office which, in the Administration's opinion, does not fully comply with their directives. Such sanctions have a very chilling effect on the concept of independence of the Administrative Law Judge Corps within this Agency. Because at the very least the Judges themselves can be faced with a situation where they could be forced to transfer to another Hearing Office or become engaged in very extensive travel insofar as hearing cases at other locations, and worst of all an OHA staff member could very well be faced with loss of their livelihood.

We think that it is obvious from the comments which we have made in this letter that the Administrative Law Judge Corps of the S.S.A. needs all the help that it can possibly get from Congress. It was an Act of Congress which established the procedures under which we are trying to operate, and it is only Congress who can ensure that those procedures are honored by the bureaucrats whose interests are entirely contrary to those concerned with an efficient and proper administration of the system.

We want to thank you at this time for your very substantial interest in the problems with which we are faced, and we hope that if we all work together we can resolve them in the very near future.

Very truly yours,

Joseph H. Delaney

John A. LaFalce

Robert D. Stalker

P.S. It should be noted that Judge Dennis L. Runyan of this office has mailed a letter to your sub-committee under separate cover, relative to this matter. Judge Runyan was on vacation at the time of the preparation of this correspondence and therefore subject letter could not be presented to him for his review prior to the mailing of same.

STATEMENT OF DAVID T. HUBBARD
UNITED STATES ADMINISTRATIVE LAW JUDGE
BEFORE
THE SUBCOMMITTEE ON SOCIAL SECURITY
OF
HOUSE COMMITTEE ON WAYS AND MEANS
JUNE 13, 1990

My name is David Hubbard. I have been a United States Administrative Law Judge for the past 16 years. I have my office in Fort Smith, Arkansas, and hear cases in Fort Smith, Fayetteville, Harrison, and Russellville, Arkansas. It is a pleasure and privilege to provide this statement for the record at this hearing. This statement is my own, and does not represent the opinion of the Office of Hearings and Appeals or any other governmental agency. I am a member of the Association of Administrative Law Judges, Inc., and, I believe, the membership of this organization would support the opinions discussed in this statement. This organization is composed of United States Administrative Law Judges in the Office of Hearings and Appeals, Social Security Administration. The stated purpose of this organization is to promote due process hearings to those individuals seeking adjudication of controversies with the Social Security Administration and the Department of Health and Human Services.

The fundamental, overriding problem in the Office of Hearings and Appeals is the responsibility and accountability for the entire hearing and decisional process which is placed upon the individual ALJ to whom a particular case is assigned. However, authority for case control, hiring of personnel(including staff attorneys and paralegals who assist the ALJs in preparing draft decisions), etc. has been removed from the ALJs and has been given to an ever-enlarging group of non-legally trained bureaucrats who have no understanding of the concepts embodied in the Administrative Procedures Act or the concept of administrative due process in general. The long standing conflict and controversy within the Office of Hearings and Appeals caused by the housing of the ALJs within the Social Security Administration itself is well documented. Congressional hearings in 1975, 1979, 1981, 1983, 1988 and in March, 1989, clearly have established that the problems are systemic to the present organizational arrangement that demands that ALJs are to be "employees" of the Social Security Administration subject to its management direction and control. On a personal note, I have only one person assigned to me. This lady serves as a paralegal and drafts decisions for my signature. However, I have no one to whom I can turn to prepare cases for hearing, type official letters, prepare memoranda, and other work products. If a given case file is not on my desk or is not the one in front of me for the claimant who is sitting before me at a hearing which I am conducting, I have no idea where that case file is or what is being done with it. These are functions which were normally carried out by a staff assigned directly to me which included a hearing assistant and a hearing clerk when I had my own staff. However, under the current management arrangement, these persons are now part of a "pool" and no longer report to me for their work or their job evaluations.

The power and the authority of the individual ALJ to control the manner and methods by which he holds hearings and renders decisions, and the usurpation of that power by the Social Security Administration and its managers have failed to provide adequate support staff, equipment, and other essential legal tools to the judges and has prevented us from carrying out our jobs properly. In spite of the fact that the Administration has repeatedly paid lip service to the concept of "quality" in the decisional process, the constant assurances made by the Administration have never come to fruition. On the contrary, there has been a consistent trend to establish and superimpose layer upon layer of managerial personnel upon the ALJs, and a concurrent reduction in the number of employees who are actually charged with doing the work. To further aggravate the matter, the agency has asserted the need to "pool staff" in order to reduce the number of employees required to do the work, cut budgets, etc., to such a manner and extent that the ALJs have absolutely no effective control over the manner and method the work is performed. At the same time the number of non-productive "managers" increases. This policy, rather than insuring that the judges can effectively carry out their mission, unfairly restricts the ALJs in the performance of their statutory duties and has subjected them to criticism, and or possible disciplinary action. Even the hearings are now subject to outside influence because all hearings are held with a contract reporter who has no knowledge of the background of the case. These persons are independent contractors and render services previously provided by the hearing assistant who was assigned to a particular judge. The abuses of "contracting out" have been covered in many hearings held by the Congress is the past several years. The function of the contract reporter is to operate a tape recorder and to prepare notes for the ALJ to use when deciding the case. This puts more pressure on the ALJ to make sure that the record is correct and that sufficient information is written down. I find that I have to keep long and detailed notes by myself to make sure that I have enough information written down in each case because many hearing reporters are new and are not familiar with my way of conducting hearings. We are constantly having to hire new hearing reporters because these positions are part-time only. By the time we get a hearing reporter trained, this person usually gets a full time job, and we are back to square one training a new hearing reporter.

In times past the Association has fought to maintain the independence of the ALJ within the system of administrative law. You will recall the horror of the Bellmon Review Process whereby the politically appointed Associate Commissioner of the Office of Hearings and Appeals sought to discipline ALJs who allowed a larger percentage of their cases in comparison to some magical allowable percentage devised by this politically appointed Asociate Commissioner of the Office of Hearings and Appeals.

Senator David Pryor of Arkansas conducted a Joint Hearing in Ft. Smith, Arkansas, in November, 1982, for the Senate Special Committee on Aging and the Senate Committee on Governmental Affairs, where testimony was heard from public witnesses(including physicians, and Social Security beneficiaries) as well as by myself, Judge Jerry Thomasson and Judge Francis Mayhue how the decision to trim the rolls of the disabled lead to horror stories too numerous to mention. Although Senator Pryor invited a representative of the Social Security Administration to appear, SSA refused to send someone to respond to the many questions about the cessation of disability benefits that hurt thousands of people both in Arkansas and in the nation as a whole. What we did not know at the time was that the Associate Commissioner for Hearings and Appeals, Louis Hays, had a Performance Plan required by the regulations pertaining to the Senior Executive Service approved by the then Deputy Commissioner, Paul Simmons, and ultimately approved by the Commissioner of the Social Security Administration, John Svahn, for a six month period beginning April 1, 1982. This performance plain stated:

> "One result of these steps will be <u>some reduction in the ALJ allowance rate</u>."(emphasis mine)

On October 1, 1983, his new Performance Plan for the next six month period(also approved by his politically appointed superiors in the Social Security Administration) stated:

> "One result will be <u>some further reduction in the ALJ allowance rate</u>."(emphasis mine)

In the last Session of Congress, Senator Pryor proposed S. 1571 which provides that there will no longer be an Associate Commissioner of the Office of Hearings and Appeals who is a political appointee and is only accountable to another political appointee in the Social Security Administration. This legislation is now an integral part of S.2453. No longer will there be any performance plans to reduce allowance rates or increase the number of cases required to meet a "goal" because the Chief Administrative Law Judge under this legislation will be in charge of the agency and is prohibited by Title 5 of the U.S. Code from having a performance plan or rating system of any type. This insulation of the Chief Judge as provided in this bill prevents the politically appointed managers in the Social Security Administration from requiring the Chief Judge to implement policies which, indeed, might help destroy the hearing process because under this legislation, he is reportable only to the Secretary of Health and Human Services. By preventing his whimsical firing for political purposes and allowing such only when a finding has been made by the Secretary that he has been guilty of neglect of duty or malfeasance in office, and requiring that this finding be reported by the Secretary to the Speaker of the House and to the President pro tempore of the Senate. This legislation says, in effect, that the Chief Judge shall run the Office of Hearings and Appeals without political influence and cannot be fired except under very unusual circumstances.

One of the events which occurred following the Ft. Smith Hearing by Senator Pryor was the filing of a lawsuit by the Association of Administrative Law Judges, Inc. This was after two of the ALJs(Judges Mayhue and Thomasson) in the Ft. Smith hearing office had been called to Washington to the headquarters of the Office of Hearings and Appeals and told that "no peace would occur in Ft. Smith until the ALJs reduced substantially their reversal(allowance) rates." Also, two of the ALJs(myself and Judge Thomasson) had been notified that we would have to report for "peer counseling"(otherwise known as 'behavior modification') by the Regional Chief Administrative Law Judge and the Deputy Chief Administrative Law Judge. Both of these acts were clear violations of Title 5 of the U.S. Code, but in those days(and even today) management paid no attention to the Administrative Procedures Act. During the course of the trial, testimony was adduced that a plan had been established by the politically appointed Associate Commissioner of OHA to begin a "behavior modification" project for those ALJs who allowed a greater percentage of their cases than some magical average percentage allowance fixed by the politically appointed Associate Commissioner and approved by his politically appointed superiors at the Social Security Administration. This was the mechanism he had chosen along with the peer review conferences to fire a significant number of the high allowance judges. I was in that group he would have attempted to fire. Although this project never came to fruition, it would have been conducted had the lawsuit not been filed. In her decision, Judge Joyce Hens Green stated:

> "...the evidence, as a whole, persuasively demonstrated that the defendants retained an unjustifiable preoccupation with allowance rates,(emphasis mine) to the extent that the ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been largely on subjective factors, as a matter of common sense, that pressure may have influenced some outcomes." Association of Administrative Law Judges, Inc. v. Heckler, 620 F. Supp. 1132 (District Court, District of Columbia, 1984).

One other issue which I feel needs to be addressed is the matter of production quotas. The management of OHA will never admit that these exist for they are always careful to use the term "goal" rather than "quota." Such a distinction is ludicrous. The record is so voluminous on this issue that to discuss it in detail would take several hours. However, an excerpt of a letter received by Judge Jerry Thomasson of the Fort Smith Hearing Office in March, 1988, shows to what extent management goes to harass the ALJs in the Office of Hearings and Appeals. In the letter written by Regional Chief Administrative Law Judge William Helsper the following language was used:

> "I have reviewed your performance over the past six months and am somewhat of a loss to understand the vast disparity between the level of your performance and other judges similarly situated throughout the region. As you know, the Associate Commissioner has set a goal for this year of an average monthly performance level of 37 dispositions per judge."(emphasis mine)

Needless to say, this letter violates the Administrative Procedures Act found in Title 5 of the U.S. Code because it specifically states that ALJs shall receive no performance rating by anyone.

Attempts by the agency to fire judges solely on the basis of their failing to meet Agency quotas, while unsuccessful, ruined the careers of the ALJs charged. See: SSA v. Goodman, No. HQ75218210015, MSPB April 6, 1983, remanded Fed. Cir. 33 MSPR 325 (1987) $185,000 attorney fees awarded against SSA; SSA v. Balaban, No. HQ75218210014, MSPB February 9, 1983, remanded Fed. Cir. 33 MSPR 309 (1987) $51,000 attorney fees awarded against SSA. As you can see, the track record of the management of OHA has not been good in this area, but they still continue to force their "goals" upon the ALJ corps.

I believe that the way the Associate Commissioner determines her goal each year is to divide the expected case receipts by the number of ALJs in the country. In 1983 OHA had 797 ALJs. This number has dwindled to about 600. There have been a few new ALJs appointed in the last couple of years, but our number in no way approaches the 1983 number. It has been estimated that approximately 40% of the current corps is eligible for retirement. If all those ALJs took retirement, the Associate Commissioner's goal would probably be 75-100 cases per ALJ.

At one time I was one of the youngest ALJs in the country. When I began my service with OHA in 1974, I was in a training class with Judge Charles Collins who was assigned to the New Orleans hearing office. He has been one of my best friends among the ALJs in OHA. When Judge Collins retired early in 1989, he was asked by officials in OHA the reason he had chosen to retire at that time. On the retirement questionnaire he stated:

> "My principal reason for retiring is that the Social Security Administration has always opposed the APA hearing process which is mandated by law. SSA has since at least 1974 carried on a systematic campaign of harrassment, insult, and intimidation against the Administrative Law Judges. This campaign is well documented by court and congressional records. As a result of this effort by SSA the morale of my office is so depressed that to continue my employment would be detrimental to my physical and mental health."

Each month there is a conference call in our region between the Regional Chief Law Judge and the Hearing Office Chief ALJ in each of the offices in the region. I am told that the first item on the agenda each month is whether the Associate Commissioner's productivity goal has been met for the previous month. As I told you earlier, I have one person assigned to me whose job function is to prepare draft decisions for my signature. She is under a job evaluation plan which requires her to draft at least 40 decisions per month in order to maintain her outstanding rating. This is the way OHA forces their goals onto the ALJ by putting production quotas on the staff. The 40 decision month has lead to a reduction in the quality of my decisions because all OHA thinks about these days is numbers, numbers, numbers.

In 1975, Judge Troutman, a United States District Judge for the Eastern District of Pennsylvania, confronted the issue of production goals thrust upon ALJs at that time. His language is as timely in 1990 as it was in 1975:

> "That the law judge has 'other cases' and that 'we have to dispose of these cases,' does not justify encroachment upon the plaintiff's statutory and constitutional rights of a full, fair, complete and impartial hearing. This Court is also subjected to the constant and burdensome administrative and statistical pressures to 'dispose of these cases and we too have 'other cases.' While the computer can add and subtract numbers faster and more accurately than the human mind and thus keep the 'pressures' applied, it cannot weigh the quality of justice dispensed under the 'pressures' it creates. The measure of quality goes unstatisticized and unrecorded. But when all cases are up to date and all calendars current, we will have gained nothing if justice has not been dispensed and public confidence in our system destroyed. It will then be too late to revise the process from within the system because those who reacted to and satisfied the demands of the computer are collectively 'the system' and will ill-explain the sacrifice of quality. They will find no refuge in the computer and receive no defense from the administrators dispensing the statistics. This record aptly demonstrates what happens when a judicial officer understandably and conscientiously reacts to unrelenting statistical pressures. ...To suggest that justice delayed is justice denied is not the answer. Justice delayed is not always justice denied, and speedy justice is not always justice obtained. Increased pressures on the judiciary resulting from increased litigation because of increased use of the courts by our society is an increased burden which must be met the the judiciary alone, without sacrificing the quality of justice dispensed. The resulting pressures should and must be assumed by the judiciary without complaint. However, the additional and sometimes unwarranted pressures emanating from the legislative and administrative forces in the form of faceless statistics spewed out by soulless computers may constitute an unjustifiable burden which the judiciary is not warranted in assuming, tending as it sometimes must to adversely affect the quality of justice. If justice delayed is justice denied, then justice without quality is also justice denied, a result for which the judiciary alone will be held accountable without reference to collateral pressures from whatever source." Graver v. Secretary, 405 F. Supp. 631 (1975)

In conclusion, I believe, as do a vast majority of my colleagues, that the Congress must do something to alleviate the discord between the mangement of OHA and the ALJs. At the very least, the Congress should provide better insulation of the Chief Administrative Law Judge(as proposed by Senator Pryor) because the Chief Administrative Law Judge is reportable only to the Secretary of Health and Human Services and can buttress any action by management within the Social Security Administration which might tend to subvert the hearing process as it now exists because he cannot be required to meet any performance plan or goal established by management in the Social Security Administration. By having the Office of Hearings and Appeals managed by the Chief Administrative Law Judge this would eliminate the politically appointed Associate Commissioner. An even better solution would be to remove the ALJs from all the executive agencies, and to establish an independent corps of Administrative Law Judges which would assign cases in rotation as needed by the executive agencies of the government. This would make absolutely sure that executive agencies like SSA could not exert pressure on the ALJs as is the current practice by the Office of Hearings and Appeals.

ASSOCIATED STAFF ATTORNEYS
OF THE
OFFICE OF HEARINGS AND APPEALS

National Treasury Employees Union
Chapter 224

Please Reply To:

Kenneth Paulini
President
692 Euclid Avenue
Elmhurst, Illinois 60126

June 20, 1990

Mr. Robert J. Leonard
Chief Counsel
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Leonard:

Enclosed you will find 6 copies of my statement for the printed record of the hearing held on June 13, 1990 by the Subcommittee on Social Security concerning the independence of Administrative Law Judges at the Social Security Administration. Any questions or comments concerning the enclosed statement should be directed to me at the above address. I can also be reached by telephone at (312)886-9665.

In a related matter, I understand that in his testimony before the Subcommittee on June 13th and in his written statement, ALJ Richard F. Sprague referred to me as a source for some of the matters he asserted (see page 4 of his written statement). I have not seen a transcript of Judge Sprague's testimony, but I have read his written statement. The Subcommittee should be aware that Judge Sprague did not accurately represent either my comments to him or my recollections of the events that occurred in the Chicago-West hearing office while Judge Theodore Haynes was that office's Hearing Office Chief Administrative Law Judge. For instance, I never told Judge Sprague that Judge Haynes, "paid a filing cabinet full of Medicare cases on the record," nor do I recall Judge Haynes ever doing such a thing. Further, Sprague's statement that, "no one had even reviewed them [the Medicare cases]," is also not true. Those cases were reviewed both by qualified staff attorneys and later by the ALJs assigned to adjudicate the cases. Each ALJ had an opportunity to satisfy himself that each case assigned to him could properly be paid without a hearing. If an ALJ felt that a case required further development or an oral hearing prior to decision, he was not pressured or obligated to issue an on the record decision.

I resent Judge Sprague's inclusion of references to me without first obtaining my permission. Further, I object to his involving both me personally and Chapter 224 of the National Treasury Employees Union in what I consider efforts motivated more by personal animosity than by a legitimate interest in improving the ALJ hearing process.

I would be most happy to provide the Subcommitee with my recollections and opinions concerning Judge Haynes' management of both the Chicago-West hearing office and Region V generally. Please do not hesitate to contact me.

Very truly yours,

Kenneth Paulini
President

cc: Executive Board
Susan Shaw (NTEU)
Stephen Keller (NTEU)
Hon. Theodore Haynes

Enclosures

STATEMENT OF KENNETH PAULINI, NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 224, ELMHURST, ILL.

Chapter 224 of the National Treasury Employees Union (NTEU) represents over 80 percent of the attorney-advisors (staff attorneys) employed by the Social Security Administration's Office of Hearings and Appeals (OHA). We represent the staff attorneys working in 96 of OHA's 132 hearing offices nationwide. Staff attorneys serve as advisors to OHA's administrative law judges (ALJs). We work under the direction of OHA's judges; we are not advocates for the agency. Our position is most like that of a law clerk to a judge.

Staff attorneys are very familiar with the perennial dispute between OHA management and the ALJ corps over agency productivity initiatives. Staff attorneys have been acutely affected by OHA management's efforts to increase productivity. Our numerical performance standards have changed almost yearly as the agency's workload has increased. Agency numeric performance standards have been based solely on the amount of work that needs to be done without considering the actual amount of time needed to perform quality work. The pressures of meeting changing and often unrealistic performance quotas while still performing quality work have resulted in a high degree of staff attorney burn-out and poor morale within the staff attorney ranks. More and more staff attorneys are leaving the position after only three or less years on the job; just when they reach the journeyman level. Further, greater numbers of the agency's most experienced and able attorneys (those with five or more years on the job) are leaving for jobs providing a less adverse work environment, higher pay, and better promotion potential. The issues coming before OHA judges are complex and technical and not easily mastered. The drain of attorney talent at OHA is having a negative effect on OHA's stated efforts to improve the quality and legal sufficiency of ALJ decisions and the efficiency of the hearing process.

Because of our role in the hearing process, as agency employees, and as colleagues of the agency's judges, we are uniquely situated to provide a balanced assessment of the effect of agency productivity initiatives on ALJ decisional independence. It is true that OHA management has refused to approve transfer requests of ALJs who do not issue what agency managers consider an acceptable number of written decisions each month. Cases are regularly transferred from one hearing office to judges in another hearing office for hearing and adjudication. In the past, OHA management adopted a policy of allocating limited agency resources to reward those hearing offices considered productive by management. For example, those offices whose ALJs produced large numbers of ALJ decisions are more likely to receive authority to hire support staff. In some instances, staff attorneys and other office employees have been told that the amount of award money that an office will receive (and therefore how much each eligible employee will receive) depends on how many ALJ decisions are issued by that office. Thus, employee awards are in part contingent on the work habits of the office's ALJs.

The question then becomes whether such policies and actions have interfered with the decisional independence of OHA's ALJs. It is our experience, based on conversations with ALJs and observing their activities and behavior, that these and other agency activities, although troublesome, have not adversely affected the ability of ALJs to adequately and fairly develop the hearing record and to make legally sufficient and impartial decisions.

To be specific, no ALJ is or has been prevented from, for example, obtaining consultative examinations of a claimant, obtaining medical records and reports from treating physicians, taking medical expert and vocational expert testimony at a hearing, or in any other way developing a full and fair hearing record due to any agency productivity initiative taken to date. Furthermore, we have seen no evidence that any ALJ has decided any case against any claimant because of real or perceived pressure by OHA management.

We realize that these facts may not be in accord with the beliefs of some outside individuals and groups genuinely concerned with maintaining the integrity of the Social Security administrative appeals process. Nevertheless, our conclusions are the result of our 15 years of experience inside the agency, working closely with OHA's judges and observing their decisionmaking activities.

Giving agency managers the authority to determine the pace and timing of ALJ decisionmaking would be unwise. Each case is different and requires a different degree of development and time to adjudicate. Often, how quickly pre-hearing development is completed, hearings are held, and decisions are issued depend on factors outside of the control of an ALJ. For example, treating physicians may delay in sending in reports, consultative examinations must be scheduled through state agencies, and hearings may be postponed because of a scheduling conflicts with claimant attorneys. Each ALJ should, however, be accountable to claimants for the efficient adjudication of the cases on his docket. We recommend that every ALJ be required to contact each claimant whose case is before that ALJ every 45 days to tell the claimant the current status of the case, the reason for any delays, and when the ALJ anticipates completing the next phase of the process (e.g., holding the hearing, issuing the written decision, etc.).

Actions such elevating the OHA ALJ position in SSA's organizational hierarchy or locating them within another part of the Department of Health and Human Services or the Social Security Administration are unlikely to improve the quality of OHA ALJ decisionmaking. The problems with OHA are not the result of organization or processes; they are the result of the people working in and with the system. Successive SSA and OHA managers have never really accepted the fact that the work that is done at OHA is fundamentally different from that performed by other components of SSA. Much of the work performed by other components of SSA deals with information collection and processing. Data is collected and entered into a computer and the computer, after performing calculations, produces a result concerning issues like benefit amounts and insured status. The judicial function performed by OHA employees requires personal contact with people and the exercise of human judgment.

SSA needs managers at all levels that realize and are firmly committed to the concept of OHA as a judicial organization. OHA needs managers that lead more than manage, and who facilitate more than supervise. OHA's judges must accept that they are employees of the executive branch of government, and therefore, are subject to reasonable measures governing their activities. Some of OHA's most vocal judges have confused the right to be independent in their decisionmaking with a desire to be wholly unaccountable for their job performance. All agency employees, including staff attorneys, must maintain the personal integrity and commitment needed to always do the best possible job even under adverse working conditions. Generally, what is needed in OHA are changes in perceptions, beliefs, attitudes, and behavior. These changes will not result from drawing new or different lines on an organizational chart.

The Subcommittee has also asked for views on the impact of the reconfiguration of hearing office support staff on the quality of OHA ALJ decisions. Reconfiguration has neither helped nor hurt the quality of ALJ decisionmaking in OHA. As indicated earlier, the problems at OHA are problems with people not process. Even under reconfiguration, hearing office supervisors usually accede to ALJ requests concerning staff activities. Simply stated, inside the hearing office things are done the way the ALJs in that office want them done.

Some ALJs contend that they should have the power to rate the support staff though the performance appraisal process. Every ALJ has the right to give each hearing office supervisor his opinion about the job performance of each employee. Most ALJs, however, have not shown an interest in the appraisal process.

The union is very concerned about giving each ALJ supervisory authority. Our experience with those ALJs that become Hearing Office Chief ALJs is that they know little about personnel rules and generally do not care to learn about this subject. They rarely read employee performance plans, and never read collective bargaining agreements. We are not confident that the rest of OHA's ALJs will perform any better as supervisors. Employees have a right to expect that supervisors will know and follow the personnel rules in effect and will be familiar with and honor collective bargaining agreements.

Over the last year, a number of reports recommending changes in the Social Security Administration's administrative adjudication process have been issued. The goal of such recommendations is to improve the efficiency and quality of agency decisionmaking. Although some of the changes, such as eliminating the reconsideration stage or abolishing the Appeals Council, may speed up the process, it is doubtful that the quality and accuracy of the decisions issued by the agency will be significantly enhanced. OHA ALJs have always had the full power, authority and opportunity to provide a fair hearing and impartial decision to each claimant despite agency productivity initiatives. Their written decisions accurately convey their reasons for those decisions. I am convinced that those decisions represent the highest and best work of which each ALJ is capable.

Thank you for this opportunity to comment.

12098 Francesca Drive
Grand Blanc, MI 48439
December 26, 1989

The Honorable Andrew Jacobs, Jr., Chairman
Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

Re: Performance Quotas for Flint, Michigan, Hearing Office Administrative Law Judges

Dear Congressman Jacobs:

I am in receipt of your letter of October 25, 1989 to Administrative Law Judge Richard F. Sprague, and thus am providing you the scenario regarding performance quotas for Administrative Law Judges in the Flint, Michigan, hearing office of the Social Security Administration.

Early in 1989 the Regional Chief Administrative Law Judge Theodore Haynes let it be known to the Flint Hearing Office Chief Administrative Law Judge that if each judge in this office did not schedule forty hearings per month and get out thirty-seven decisions per month, the office would be closed. Furthermore, at that time they took away all the Saginaw cases from this office. Each judge in this office almost immediately thereafter took steps to come into compliance with such edict. And what was the reward for meeting their artificial production quotas? I was sent to Indianapolis (twice) and Hermitage, Pennsylvania, to hear a week of cases whose hearing requests were filed long after the ones filed with the Flint office and assigned to me, which I then had to set aside. Now, I am told it will be necessary for me to travel either to Mansfield, Ohio, or Cleveland to hear another week of cases either in February or March of 1990.

I should add at great personal sacrifice of my own time and with my family, I (and the other judges in this office) have, to the extent humanly possible, complied with the 40-37 quotas imposed by Judge Haynes. As recently as December 13, 1989, the Hearing Office Chief Administrative Law Judge stated during a meeting of all employees that if any of the judges were to let their production slip, this office would be closed. I note that one other judge took several weeks of vacation, and one month did not reach the quotas set. I also note I am planning on taking approximately two weeks vacation at the end of this year and the first of next, so there is no way it is possible for me to reach the 40-37 quotas. I think it is an extremely sad state of affairs when an Administrative Law Judge cannot even take two weeks

of vacation without being made to feel guilty and receive threats that the entire hearing office will be closed. I note the regional figures received on December 13, 1989, indicate the Flint hearing office was exactly in the middle of all the hearing orfices in this region regarding decisions dispersed per Administrative Law Judge, even allowing for the two week vacation of another judge (see Attachment No. 1). And, our numbers in several other categories were considerably better than the 50th percentile. It almost defies credulity that if the Flint office did not meet the 40-37 quotas, it would be closed, while such offices as Lansing, Detroit, Oak Park, Indianapolis and Evanston would be allowed to remain open, even though their monthly dispositions per ALJ was less.

What it all boils down to is: Let's get the numbers and not worry about a quality or due process decision. Thus, I can say without reservation the only solution is for at least the Administrative Law Judges hearing Social Security cases to be completely independent of both the Social Security Administration and the Department of Health and Human Services, with absolutely no inteference therefrom, such as artificial quotas and threats or dire consequences for not meeting them. I would be willing to testify at your hearings should you so request.

Sincerely,

Dennis L. Runyan

Dennis L. Runyan
Administrative Law Judge

Encl: (1)
cc: Administrative Law Judge Francis J. O'Byrne
DLR: jasr

Judge Runyan Rec'd 12-13-89 Memo 3 Ltr 3

WORK PERFORMANCE REPORT OF HEARING OFFICES

MONTH: NOVEMBER, 1989

OFFICE	AVG DISP PER ALJ	AVG RECPTS PER ALJ	AVG PEND PER ALJ	% HEARD TO SCHED	AVG AGE OF PEND	AVG PROC TIME	CLOSE PEND	# 270 DAYS OLD	% 270 DAYS OLD	# OVER 365 DAYS	% OVER 365 DAYS
CHICAGO (W)	52.0	33.6	482.8	56.2	363.2	320.6	2414	1520	62.97%	1400	58.00%
DAYTON	47.2	45.3	293.5	72.7	120.4	188.7	1174	68	5.79%	19	1.62%
GRAND RAPIDS	41.5	25.4	192.4	55.3	109.7	183.7	962	20	2.08%	6	0.62%
MILWAUKEE	40.3	39.2	248.1	77.9	130.4	210.5	2481	214	8.63%	79	3.18%
EVANSVILLE	40.0	29.8	228.0	26.9	127.5	230.4	912	65	7.13%	20	2.19%
PEORIA	39.8	31.6	175.3	53.9	106.3	146.2	879	40	4.55%	8	0.91%
FT. WAYNE	39.1	36.0	232.3	77.7	110.8	176.4	697	15	2.15%	2	0.29%
CHICAGO (D)	37.0	24.0	216.9	48.7	175.0	264.4	1952	345	17.67%	172	8.81%
CINCINNATI	36.1	27.2	220.4	68.9	162.0	259.8	1102	137	12.43%	40	3.63%
[illegible]	33.3	22.8	135.8	40.8	120.7	224.6	583	63	11.60%	6	1.10%
DETROIT	32.7	25.8	237.7	51.0	289.6	236.6	2139	236	11.03%	111	5.19%
COLUMBUS	32.0	31.1	236.9	71.9	157.4	264.2	1658	272	16.41%	98	5.91%
CLEVELAND	31.3	38.2	276.6	83.2	137.1	240.9	3319	178	5.36%	63	1.90%
OAK PARK	28.7	21.9	211.3	68.2	161.2	233.9	1902	266	13.99%	104	5.47%
MINNEAPOLIS	26.5	34.7	305.2	49.0	156.8	244.9	1831	244	13.33%	124	6.77%
CHICAGO (S)	25.3	26.8	182.6	60.9	161.1	225.0	1461	244	16.70%	114	7.80%
LANSING	24.7	17.4	202.0	64.2	222.7	321.9	1010	347	34.36%	142	14.06%
INDIANAPOLIS	24.3	26.9	191.7	70.3	160.5	218.2	1917	299	15.60%	121	6.31%
EVANSTON	23.3	37.1	164.1	45.0	136.4	238.7	1149	170	14.80%	83	7.22%
TOTAL/AVG.	33.0	30.3	232.3	62.9	175.4	236.3	29502	4743	16.08%	2712	9.19%
REGIONAL GOAL	37.0				140.00	200.00					3.20
NATIONAL GOAL	37.0			85.0	128.00						3.20

Andy Jacobs, Jr., Chairman
Subcommittee on Social Security
Committee on Ways and Means
United States House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

RE: Hearing on the judicial independence of Administrative Law Judges at the Social Security Administration held on June 13, 1990.

Mr. Chairman and members of the Subcommittee on Social Security we wish to thank you for this opportunity to present the facts relative to the Office of Hearings and Appeals (OHA) management's threats, punishment, and harassment of the Administrative Law Judges at Lansing, Michigan OHA since February 1989. All of these attempts to intimidate the Lansing judges have arisen because of the judges' refusal to comply with quotas, both defined and undefined, that have been attempted to be imposed by OHA management on a continuous basis since February 1989.

Typing assistance to prepare this document was requested of Region V OHA, but the same was refused by RCALJ Ahlgren and RMO Carey, who indicated that "providing information to the Social Security Subcommittee was not OHA business." It is felt that such a policy interpretation was made to cover up, mask, and hopefully to prevent the subcommittee from ascertaining the extent of the ALJ harassment and punishment that has gone on at Lansing OHA since February 1989. However, since the undersigned have already spent thousands of dollars and hundreds of hours in filing charges against CALJ T. Haynes and Associate Commissioner Bradley with the United States Merit Systems Protection Board on this issue, the cost of getting this typed at the expense of the undersigned must be considered as just an additional expense to see that future ALJs are not punished because they would not meet unrealistic and unsubstantiated quotas.

By way of placing a historical perspective on the situation, it must be pointed out that the five (5) judges at Lansing OHA in February 1989 were some of the most senior Administrative Law Judges in all of OHA in that each of them had 10-15 years experience in that capacity at Lansing OHA.[1] On and before that time the Lansing judges had enjoyed an outstanding reputation with many attorneys and legal representatives for giving full and complete hearings; for giving full and complete consideration to each individual case; and for not running an "assembly line operation."[2] As one attorney put it, while he did not always agree with the decisions issued, he did feel that decisions were issued "promptly and fairly."[3] Or as one legal representative, who is handicapped himself with cerebral palsy, put it, Lansing OHA contains "the finest group of people I have ever had the fortune to work with."[4]

In addition, prior to the acts of harassment, punishment, etc., that commenced in February 1989, Regional Chief Judge (RCALJ) Theodore Haynes, after a visit of April 1988, wrote in a memorandum that, "Offices such as yours make my job infinitely easier."[5]

Thereafter, on January 10, 1989 RCALJ Haynes threatened in a Regional Conference telephone call that: (1) only offices that produce would receive support staff; (2) "non-producers" would lose service areas, and (3) ALJ requests for transfers would not be approved for "low-producers." The judges at Lansing were not too concerned by these threats of punitive action in view of Judge Haynes' past praise and a Letter of Commendation that was sent to Lansing OHA on January 26, 1989 by Associate Commissioner Eileen Bradley.[6] Some of her comments were as follows:

"You and your staff's commitment to providing timely, quality services has not gone unnoticed. It is clear that service to the public is the paramount objective of the staff of Lansing OHA" (underlining supplied).

Yet, in face of his own prior assessments of Lansing OHA and the Letter of Commendation issued by Associate Commissioner Bradley only eleven (11) days before, RCALJ Haynes on February 6, 1989 stripped Lansing OHA of its service areas in Traverse City, Petoskey, Alpena, Sault Ste. Marie, and Mt. Pleasant, Michigan "to provide more timely service to the public."[7] Such an averment by RCALJ Haynes was in direct conflict with Associate Commissioner Bradley's Letter of Commendation; it was a patently false misrepresentation of the facts; and it was the beginning of RCALJ Haynes' plan of a punitive action against the ALJs at Lansing OHA.

Since that time repeated threats have been made from the RCALJ's office to Lansing OHA that: Lansing OHA would be closed; employees were advised to transfer rights; and it was noted Lansing would be allowed to "die on the vine." In addition, RCALJ Haynes approved transfers, over Lansing OHA objections, of two Lansing employees to Grand Rapids OHA at a time when Grand Rapids OHA had a ratio of over 5 clericals per ALJ while Lansing OHA had only a total of six (6) clericals to serve five (5) ALJs.[8] As a further consequence of Judge Haynes' threats to close the office, many experienced clerical employees at Lansing OHA have left, including all of the minority representation, and morale plummeted to an all time low.

When RCALJ Haynes and Associate Commissioner Bradley were confronted by multiple complaints by alarmed attorneys, representatives, and Congressional inquiries, they responded by denying that Lansing OHA would be closed and indicated that service areas had been transferred due to a "Lansing backlog."[9] This again was a misrepresentation of the facts, since OHA's own "WORK PERFORMANCE REPORT OF MARCH 1989" revealed that both Detroit OHA and Grand Rapids OHA had more cases pending per judge than did Lansing OHA.[10] Further, while contending that Lansing OHA had a "backlog", one hundred fifty (150) cases were assigned to Lansing judges by RCALJ Haynes to be heard outside of Lansing OHA's service area in Chicago, Evanston, and Cincinnati.[11]

Clearly, then, the transfer of Lansing OHA's service area was not done because of any "backlog", but rather, like the deliberate failure to provide adequate clerical staff, were acts designed to punish and intimidate the ALJs at Lansing OHA, whom RCALJ Haynes deemed to be "unproductive".

RCALJ Haynes went even further on May 3, 1989, when he openly attacked and criticized the Lansing OHA judges at a seminar conducted by vocational experts at Delta College in Saginaw, Michigan.[12] When questioned by a participant as to the reassigning of the Lansing OHA service area, RCALJ Haynes referred to the Lansing judges as his "dirty linen" and made the following assertions:

1. That claimants were not getting timely service by Lansing OHA.

2. That while he could not supervise the judges, he could deal with them through staffing.

3. That he would not replace staff at Lansing OHA until the adjudication of cases increased.

4. That the judges could hear forty (40) cases per month without affecting the quality of their decisions.

That in the face of RCALJ Haynes' continuing attacks and the deteriorating situation at Lansing OHA caused by Haynes' actions, the undersigned wrote on June 2, 1989 to both Judge Haynes and Associate Commissioner Bradley to ascertain what "production" would be adequate.[13] The following was requested of them:

1) Give us a written order executed by you which mandates the specific number of cases we must schedule per month.

2) Give us a similar type order which mandates the minimum number of decisions we must issue each month.

3) In view of the fact that governmental officials may only follow lawful orders, please set forth the exact citations to the law, regulations, or case law that grant you authority to issue the above orders.

One (1) year has passed without any answer whatsoever to our request.

By July 1989 Haynes' actions had reduced our clerical staffing to 6 clericals for 5 ALJs. Yet, nationwide OHA staffed their offices with 5 clericals for 1 judge.[14] As a consequence, Lansing OHA, which was disposing of 30 cases per judge prior to February, 1989, when Haynes intervened, was only able to get out (6) decisions per judge for July 1989.

Faced with such a situation, where the management had effectively deprived us of clerical staffing, had threatened to close the office, had castigated us in a public forum, had threatened not to approve any future ALJ transfers, and had taken away service areas so that the agency could punish us with travel cases to distant places, the undersigned filed their action with the United States Merit Systems Protection Board. The case is before the Board presently. If the Board finds it has no jurisdiction, as has been recommended to it by OHA, the undersigned will appeal to the U.S. Court of Appeals, Federal Circuit, or ultimately ask for certiorari to the U.S. Supreme Court, if needed. Surely there must be a remedy somewhere to protect ALJs from the unconscionable and vicious acts of punishment from the administrators of OHA. What good is a federal statute which provides that an agency cannot punish an ALJ without a hearing before the Merit Systems Protection Board, if the Merit Systems Protection Board denies it has jurisdiction to hear the same.[15]

In July 1989 RCALJ Haynes "fired" Lansing Hearing Office Chief Administrative Law Judge (HOCALJ) Friedland and replaced him

with acting HOCALJ Remington. Since that time Judge Remington too has indicated that, if the undersigned would schedule 40 cases per month, RCALJ Haynes would "staff up" the office. Other administrators likewise have pushed the ALJs for this type of commitment before the office would be restaffed.

It should be noted that Social Security Commissioner Hardy in a letter of May 4, 1988, and Associate Commissioner Bradley in a letter of June 15, 1988, assured Congressman D. Rostenkowski, the Chairman of the Ways and Means Committee, that there were absolutely no personal goals or quotas placed upon individual ALJs.[16] This is the "de jure" position of OHA. However, there has always been also a "de facto" position on ALJ quotas. This is the one that RCALJ Haynes announced at Saginaw when he called the undersigned his "dirty linen" and which quota of 40 hearings a month was also proclaimed by the acting HOCALJ Remington.

Since a quota of 40 hearings per month had not been documented on an official or de jure basis, it must have been based upon the personal experience of RCALJ Haynes. In order to ascertain Judge Haynes' basis for his conclusion, the undersigned filed a Freedom of Information request to secure his record from January 1989 to September 1989. This was obtained after a three months delay and only after suit was threatened by the undersigned in the federal courts. The results are shocking!

During the period from January 1989 to September 1989 RCALJ Haynes disposed of 92% of his cases without any hearing whatsoever.[17]

This must be compared with the nationwide average of all OHA ALJ's, who in the first quarter of 1989, disposed of only 8% of their cases without hearings.[18]

Since Judge Haynes disposed of over 90% of his cases without hearings, it necessarily follows that his "allowance rate" must be in the 90% range, however this cannot be documented yet since OHA has refused to furnish this information.[19] As OHA pointed out in a civil action filed against it, "after extensive study" it was found that a "clear correlation exists between high allowance rates and a high number of erroneous decisions."[20]

Just a few years ago if an Administrative Law Judge had an exceedingly "high allowance rate," such as that of Judge Haynes, it was OHA policy to have the Judge counseled, retrained, and reoriented. This policy was based upon an OHA study, which has been alluded to heretofore, and which found that "high allowance rates" were consistent with "high rates of erroneous decisions." This policy was applied basically by OHA to judges, who after holding hearings, had "high allowance rates." Judge Haynes' error potential seems even greater or more likely, since his exceedingly "high allowance rate" has occurred for the most part without the holding of any hearings. However, Judge Haynes was never given any counseling, retraining, or reorientation, but rather, he was rewarded by being appointed the Chief Administrative Law Judge of OHA. How times do change.

How Judge Haynes was able to dispose of over 600 cases without hearing during the aforesaid period has been amply set forth by others testifying at this hearing. However, even Lansing was fraudulently credited with some of these HIA cases, which were not heard by Judge Haynes, not signed by him, or written by him, and which had no connection whatsoever with Lansing OHA, but rather were cases taken by Judge Haynes from Evanston, Illinois, OHA.

The undersigned always knew they were right in rejecting Judge Haynes' quotas. The mad rush for numbers leads to many abuses in the hearing process. Shorter hearings are held, less witnesses are called, there is lesser development of the medical

evidence, fewer or no vocational experts, medical experts, or consultative examiners are used. The goal becomes what is good for the ALJ's monthly report, not the issuing of a fair and just decision to a claimant. Moreover, this mad rush has even gone further in this instance, where for example, Judge Haynes has bypassed the hearing procedures completely 92% of the time. Some would say the claimants were not hurt, but how about the people who are kicking into the Social Security Trust Fund each week. They sure are hurt.

The undersigned are pleased that we challenged Judge Haynes on his 40 hearings per month quota. If the undersigned, or someone else, had not challenged this unsurpation of the hearing process, there would be no limit to the number of cases Judge Haynes, or someone in his stead, could order performed in the future - 50-70-100, whatever suited the particular purpose at the particular time.

However, the undersigned and the Lansing OHA are not out of the woods yet. RCALJ Haynes is now the national CALJ of OHA. After his hand picked successor as HOCALJ at Lansing OHA, Judge Ransom, issued a report on March 14, 1990 which confirmed most, if not all, of the undersigned's complaints, Judge Haynes in the most vile, vulgar, and profane language berated, belittled and reprimanded Judge Ransom for his findings. He told Judge Ransom that Eileen Bradley, the Associate Commissioner of OHA, had said "Where did you get that asshole" (Ransom). Judge Haynes was no doubt furious because Judge Ransom confirmed the undersigned's contentions, not those of Haynes. Judge Ransom made the following findings as to Lansing:

a) he "was impressed with the quality and diligence of the Lansing staff and ALJ's. They are dedicated".

b) "Our ALJ's are concerned with the quality of their hearings and decisions, not just numbers. They work a full day and are very conscientious".[21]

These findings, along with some others highly favorable to the undersigned's position, caused Judge Haynes to threaten to fire Judge Ransom. When Judge Ransom attempted to tell Judge Haynes that the facts justified the conclusions of his memorandum, Judge Haynes said he did not care what the facts were and that no one could tell him anything good about "those three" (again a reference to the undersigned). He added that he would like to "turn the lights off and close the door on the Lansing office."[22] This merely confirms once more the intention of the OHA administration as it pertains to Lansing OHA.

The hierarchy of OHA and Judge Haynes, in particular, will never forget that we have "blown the whistle" on them, and will no doubt continue their harassment of us in particular and Lansing OHA in general. They do not like their authority questioned, when in instances, such as this, they have grossly and maliciously overstepped their authority.

What happens to us in Lansing may not seem too important in the short run, but if they break us here in Lansing, the long range outlook for administrative justice and due process has a dim future. Therefore, we ask for the protection of the Subcommittee under the Whistleblowers Act, the Subcommittee's general jurisdiction on Social Security matters, and its inherent right to protect witnesses who appear before it. If Judge Haynes gets his

way and tries to "turn off the lights and close the door" at Lansing OHA, the undersigned will seek the aid and protection of the Subcommittee.

The information contained in the foregoing statement represents the thoughts of the undersigned United States Administrative Law Judges, and do not represent the positions or thoughts of any other person, group of persons, organization, or governmental entity.

Date June 20, 1990

Adrian V. Sannier
Administrative Law Judge

Allen C. Youngblood
Administrative Law Judge

Bruce S. King
Administrative Law Judge

Office of Hearings and Appeals
333 South Capitol Ave.
Lansing, MI 48933

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1. Complaint of ALJs Sannier, Youngblood, King, p. 1, United States Merit Systems Protections Board, Docket Nos. HQ75218910037, HQ75218910038, HQ75218910039.

2. Ibid., Exhibit B.

3. Ibid., Exhibit B.

4. Ibid., Exhibit B.

5. Ibid., Exhibit C.

6. Ibid., Exhibit D.

7. Ibid., Exhibit E.

8. Ibid., paragraph 16, page 6, and Exhibit F..

9. Ibid., paragraph 17, page 6, and Exhibit G.

10. Ibid., paragraph 19, page 7.

11. Ibid., paragraph 20, page 7.

12. Ibid., paragraph 23, page 8.

13. Ibid., paragraph 26, page 11, and Exhibit H.

14. OHA, Hearing Office Statistical Profile Report for the second quarter, Fiscal year 1989.

15. 5 U.S.C. 7521.

16. Complaint of ALJs Sannier, Youngblood, King, p. 16 paragraphs 40, 41, United States Merit Systems Protection Board.

17. Amended Complaint of February 28, 1990, Sannier, Youngblood, King, page 3, paragraph 73, United States Merit Systems Protection Board, Freedom of Information, submitted February 12, 1990.

18. Ibid., paragraph 74, referring to Hearing Office Statistic Profile, 2nd Quarter, Fiscal Year 1989 (OHA).

19. Ibid., paragraph 75, page 5.

20. Association of ALJs Inc. vs Heckler, Civil Action 83-0124, United States District Court for District of Columbia, HHS defendant statement of material facts as to which there is no genuine issue.

21. Amended Complaint of April 18, 1990, Sannier, Youngblood, King, paragraph 93, page 6, United States Merit Systems protection Board, Appendix.

22. Ibid., paragraph 92, page 5.

Office of Hearings and Appeals
Room 415, The Rotunda
711 West 40th Street
Baltimore, Maryland 21211

June 16, 1990

Honorable Andy Jacobs, Jr.
Chairman, Subcommittee on Social Security
United States House of Representatives
Washington, DC, 20515

Subject: Hearing on means of assuring the judicial independence of ALJs who preside over hearings arising out of Social Security appeals.

Dear Mr. Chairman:

This is offered in response to your kind invitation to submit written comments for inclusion in the Subcommittee's record concerning the matter of judicial independence of Administrative Law Judges assigned to the Social Security Administration's Office of Hearings and Appeals (SSA-OHA).

By way of background, perhaps I should say that I have been an ALJ since 1977. I served in that capacity for more than four years with the Interstate Commerce Commission. In 1981, I was hired by SSA-OHA and, except for a two-week period during which I was an acting member of the Appeals Council, I have continued to serve as an ALJ to the present time. In all, I have more than 22 years of Federal civil service, including service at the managerial level. I attended the then Civil Service Commission's management institute at Oak Ridge, Tennessee, before becoming an ALJ. Prior to 1968, I engaged in the private practice of law and worked for some years in managerial positions in the private sector. I hold a bachelor of science degree in business and public administration and a bachelor of laws degree, both from the University of Maryland. I have been a member of the bar for 34 years.

With the hope of sparing the Members a litany of relevant anecdotes, the following comments address the Questions set forth in the Subcommittee's press release:

(1) Performance Targets: How much latitude should SSA managers have to determine the pace and timing of ALJs' decision making? Are specific performance targets consistent with the guarantees of judicial independence for ALJs provided under the APA? If so, how should such targets be established, and what measures should be used to enforce them? If not, what other management tools, if any, should be used to assure timely hearings for claimants?

My answer to the first question is absolutely none. Any authority on the part of SSA-OHA managers to pre-determine the pace and timing of ALJs' decisions intrudes directly upon the ALJs' decisional independence. It would interfere with the performance of the duty the ALJ owes to the parties who appear before him. Decisional independence is an essential ingredient in the administration of justice. Obviously, it is the ALJ who must be in control of timing and pace because his acts are his own and it is he who is solely responsible for the success or failure of his action. Any effort to coerce or bring about change in an ALJ's conduct in the administration of justice is always an intrusion, even when it is no harsher than an enticement.

One needs only to look at the history of SSA-OHA over the years if

there is any doubt about what is written above. Management has been on a roller coaster--first intimidating the ALJs by threats of removal if production is not increased; and then pulling back when pressure is applied by Congress, the Courts, and letters and other activities of the ALJs' associations. The horror stories abound--all the way from denying transfers to ALJs based solely on numbers; to bringing charges against ALJs for low numbers (producing fewer than a pre-determined number of dispositions a month earned some ALJs the unenviable title of "targeted"); to awarding bonuses to members of the Appeals Council who are not protected under the APA for getting the right mix of reversals and affirmations and producing an ever-increasing number of dispositions; to appointing and removing chief judges, regional chief judges, and hearing office chief judges on the basis of the number of cases disposed of by ALJs; and, ultimately, to awarding bonuses to associate commissioners for achieving their own pre-determined numerical goals of so many dispositions per month per ALJ.

My answer to the second question is a resounding no. Performance targets, quotas by another name, have proven to be a constant lesson in the subordination of judicial independence to administrative fiat. Having such so-called specific targets only serves to transform the role of management from what it is intended to be--to facilitate workflow--into a pattern of manipulation and disregard for judicial independence and the quality of the end product. Setting quotas or goals entails serious risks and history proves that SSA-OHA's management has not yet been up to recognizing and admitting much less overcoming those risks. For example, not many months ago it was suggested to me that I increase by 50 percent the number of hearings I usually schedule per month for the so-called reason that a fellow ALJ in the office had announced his intention to retire within a few months and production had to be maintained. How could an ALJ possibly maintain the needed attention to detail in each case under such a plan. Nevertheless, another colleague apparently received the same or a similar suggestion because he subsequently set 100 cases for hearing in a single month. No numerical goal yet set by SSA-OHA has been shown to be proportionate to the goal of administering justice. It is a grave mistake to overlook our mission and to interfere with our ability to achieve it. Yet, all too frequently SSA-OHA management has ignored it and hampered its accomplishment to the full.

Perhaps somewhat of a parallel may be drawn here. The Judicial Branch has long recognized the principle that the Legislative Branch may enact laws of its choosing, and that the courts will defer provided the laws that are enacted do not contravene the Constitution. Review by an independent judiciary thus holds the actions of Congress in check. The APA protection of judicial independence for ALJs serves a similar purpose by holding agency management in check. Because judicial independence facilitates the making of free, fair and reasoned decisions, it is essential that ALJs be able to do so without interference by agency management. However, SSA-OHA's numerical goals have added an entirely negative ingredient to the administration of justice, i.e., Stop now! Time's up on that case. Get rid of it.

The third question is for intents and purposes rendered moot in light of the answer given here to the second question. Management certainly has the right to seek removal of an ALJ, but only through proper channels pursuant to the provisions of the APA. Removal is, as it should be, available to management with regard to any ALJ who is incompetent or otherwise unable or unwilling to perform in a competent, reasonable and professional manner. But setting a pre-determined number of case dispositions per month is not a legitimate function of management. Should the clerk of a district court have the power to control the district court judge? Members of the Subcommittee should be aware that SSA-OHA management has pursued just such a course, and it has done so relentlessly and at

considerable unnecessary expense to the taxpayers, as when prevailing individual ALJs and the Association of Administrative Law Judges have recovered their attorneys' fees under the Equal Access to Justice Act. All the while, the managers went merrily on their way collecting their bonuses. It would behoove the Subcommittee to inquire into the total amount involved in recovered attorneys' fees and management bonuses.

The fourth question is one which appears not yet to have occurred to SSA-OHA management. The answer is elementary:

- Planning. Competent planning, especially long term planning.
- Personnel. Adequate support staff under the direct supervisory control of the decision maker.
- Resources. Reasonable allocation of staff, space, reference materials, facilities, equipment and supplies.
- Training. This should be provided collectively and on an as requested basis, including informational services and training in agency policy and case management techniques.
- Coordination. This should replace the present method of staff control through reconfiguration with a program for coordinating assistance and information flowing to ALJs.

(2) Organizational structure: Some observers contend that ALJs' decisional independence could be enhanced by elevating their position in SSA's organizational hierarchy or locating them within another part of HHS or SSA. Is it likely that the quality of ALJ decision making would be improved by such an organizational restructuring? If so, what is the optimal reorganization?

My answer to the first question is this. Elevating the position of ALJ in SSA's hierarchy is long overdue. It has been years since the position of ALJ in SSA has been re-evaluated. A grade and pay floor should be established; and it should be commensurate with that of ALJs in other agencies of government that employ ALJs. Relocation also is imperative but, before an organizational structure is determined, there must be a mind capable of recognizing the overall mission and the methods and means that lead to accomplishing it. Common sense and experience enable the individual ALJ to choose well the proper means to achieve his goal. Any organizational structure that does not facilitate the exercise of care and thoughtfulness on the part of the ALJ is defective. When it is recognized that the organizational structure that presently exists has been chosen for the sole purpose of controlling judicial independence and generating bonuses for management, it is obvious that the purposes of the APA have been circumvented. Eliminating such a structure would inevitably improve the quality of ALJs' decisions.

Turning to the second question, what also must be done to achieve optimal reorganization is to separate ALJs altogether from SSA-OHA, and to have new management provide facilities and services to ALJs such as those described above under the label of management tools. The areas of program management and establishment of policies, which are of necessity binding on ALJs, are legitimate spheres of action for management. But management must leave to the ALJs themselves the requisite autonomy to oversee the day-to-day functions of case dispositions.

In part, the Report of the Federal Courts Study Committee, issued April 2, 1990 (beginning at page 55), provides some guidance in this area. The Committee recommended that Congress create a new structure for adjudicating disability claims under the Social Security Act: hearings before administrative law judges with adequate institutional independence, whose decisions could be appealed to a new Article 1 Court of Disability Claims, with review

in the courts of appeal limited to constitutional claims and pure issues of law (emphasis supplied). The Committee went on to add that Congress should prohibit the Secretary of Health and Human Services from refusing to honor federal court decisions that overrule agency policy. I realize that the Committee was studying the court system and not OHA. But I concur in these recommendations on the strength of my experience with this agency.

(3) Support Staff: Many ALJs have been critical of OHA's so-called reconfiguration of office support staff, whereby support staff formerly assigned to a single ALJ were reassigned to OHA office management. Has this change affected ALJs' performance? If so, how? What staffing configuration would be most likely to enhance the quality of ALJs' decisions?

My answer to the first question is yes, there can be no doubt about it. And my answer to the second is that ALJs are expected to pay lip service to quality and service to the public but all the time to remember that the only thing that really matters is numbers on the monthly report. Prudence deals with the right way to do or perform a task. But the doing or performing can only derive its quality from the legitimacy or illegitimacy of the goal to which it is directed. The goal of SSA-OHA has been numerical. Commissioner King has just recently found it necessary to "temporarily suspend" numerical goals in giving all SSA support staff employees job performance ratings because achieving numbers at all cost proved to have such an adverse impact upon members of the public whom the agency serves, not to mention the morale of the employees involved. The mission of SSA-OHA is to administer justice with respect to claims made by real people upon the Trust Funds. However long it may take, administering justice is a legitimate goal. SSA-OHA's goals of numbers on a monthly or annual report is an illegitimate one. It must be remembered that it is the goal that motivates action, however rightly or wrongly the action may turn out to be.

Foresight is concerned with the choice of right means to achieve a goal, but it presupposes a right or valid goal. The tragedy of SSA-OHA management of support staff and, thereby indirectly the ALJs, has not been that it cannot find solutions to such serious problems as increased caseloads and inconsistencies in decisional results. Rather, it is that management has looked for solutions in the wrong places. With all the horizons of a child, SSA-OHA management has only been able to develop the oxymoronic slogan: "Do more with less."

My answer to the third question is based upon a well-established principle in government (including the military), industry, and elsewhere. It is a cardinal principle of management that, in order for one to meet the responsibilities he or she is given, corresponding authority also must be given. With that in mind, one need only look at the following questions and answers:

- What is it that the ALJ is trying to do? Answer: Issue quality decisions in a timely fashion.

- How is he or she going to do it? Answer: With competence, diligence, resources, and with the cooperation and assistance of adequate support staff.

- Who is going to control the process? Answer: It is here that SSA-OHA management and concerned ALJs part company.

Under reconfiguration an ALJ has been given a task and held responsible for its completion, but he or she possesses no control whatsoever over resources and staff support necessary to complete the task. That he or she can do so under reconfiguration is pure fallacy. Reason dictates that an ALJ needs to have command, here and now in any particular situation that may arise, over what is to

be done or avoided in the pursuit of the truth in individual cases before him or her. Reconfiguration does not and cannot facilitate this. In fact, it just gets in the way, because its purpose is to produce numbers, not to find the truth.

It is through a sense of justice that an ALJ is inclined to give each and every claimant whatever, if anything, he or she is due. But when the ALJ is denied the very basic element of control over the process, the inclination toward justice is seriously hampered. Reason dictates that it should be otherwise because it is justice which seeks the common good and inspires men and women to work efficiently and successfully.

When the rule of reason is not applied to the question of whether the ALJ should control the process, only two results are possible. Either there will be a frustrated ALJ because he is not in control of his work, thus adversely affecting its quality; or there will be a timid compromiser who produces more and more volume of work of lower and lower quality. Follow that to its logical conclusion and you find not only injustice, but absurdity as well.

Thank you very much for the opportunity to present these comments.

Respectfully submitted,

F. Joseph Wieman
Administrative Law Judge